Supreme Court, U.S.
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NO.93-

IN THE

Supreme Court of the United States

October Term, 1993

J. WESLEY COOPER, MARGARET COOPER and JAMES CARTER

Petitioners

v.

THE ARMSTRONG RUBBER COMPANY

Respondent

PETITION FOR ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether The Comprehensive, Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et. seq., requires that a plaintiff who sustains response costs must own the contaminated property in order to recover costs under the act?

2. Whether a Court of Appeals, in a diversity action, can blatantly ignore factual evidence in the record in order to affirm a district Courts summary dismissal of petitioners claims in direct contradiction to one hundred years of state law jurisprudence?

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The opinion of the United States Court of Appeal for the Fifth Circuit, affirming the District Court's grant of summary judgment for respondent, is reported at 989 F.2d 822, and is reprinted as Appendix A, at page A1. (References to the Appendices bound with this Petition are styled "A___"). The memorandum decision and order of the United States District Court for the Southern District of Mississippi, from which Appeal was taken, was not reported and is reprinted as Appendix B, beginning at page A15.

JURISDICTION

The decision of the Court of Appeals was announced on May 3, 1993. A timely petition for rehearing was denied on September 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Comprehensive Environmental Response, Compensation, and Liability Act. P.L. 96-510 Title 1, Section 101 (1980), 42 U.S.C §9601 et. seq.

§ 9601(14) Hazardous Substance means, (A) any substance designated pursuant to Section 1321(B)(2)(A) of Title 33, (B) any element, compound,mixture, solution, substance designated pursuant to Section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to Section 3001 of the Solid Waste Disposal Act [42 USCA Section 6921] ... any toxic pollutant listed under Section 1317(a) of Title 33, (E) any hazardous air pollutant listed under Section 112 of the Clean Air Act [42 USCA Section 7412], and (F) any imminently hazardous chemical substance or emission with respect to which the administrator has taken action pursuant to Section 2606 of Title D.

§ 9607 (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of a hazardous substance owned or possessed by such person . . . from which there is a

release, or a threatened release which causes the incurrence of response costs, shall be liable for (B) any other necessary cost of response incurred by any other person consistent with the national contingency plan.

The Seventh Amendment to the United States Constitution provides that:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be re-examined in any Court of the United States, than according to the rules of the common law.

The Rules of Decision Act, 28 U.S.C. §1652 (1988) provides, in relevant part:

§ 1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part, that:

(c) . . . The judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . .

(e) . . . When a motion for summary judgement is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse.

STATEMENT OF THE CASE

1. Petitioners sought relief pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601, et seq., and under the common law of the State of Mississippi for response costs and damages occasioned by the uncontrolled release of hazardous and toxic chemicals into the open environment of Adams County, Miss. The facts leading to the lawsuit are undisputed. These releases indisputably contained hazardous substances and occurred over a forty year period. The petitioners established that they had incurred response costs and were entitled to a declaratory judgment pursuant to 42 U.S.C. §9613(g)(2).

2. The petitioners by way of affirmative proof, present in the record, established that there had been a release of a "hazardous substance", that the defendant was the "responsible party", that the site constituted a "facility" and that petitioners had sustained "response costs." The petitioners also presented to the Court by way of direct and expert testimony the following facts: The defendant's hazardous waste stream was admittedly dumped at the Cain, *Carter* and Batieste sites. Hazardous substances as defined by the Comprehensive, Environmental Response Compensation and Liability Act have been identified in soils, sediments, ground water and surface water on and adjacent to the sites. Petitioner Carter is the owner of the Carter Hazardous Waste Site.

3. The same compounds in elevated concentrations have been identified in surface water running through the Cooper homestead and in the homesteads well water. As a result of the investigation conducted and paid for by Mr. Cooper, it was learned that Armstrong, at times in direct violation of the law, had dumped in excess of one million

(1,000,000) pounds of hazardous wastes into these sites. The Mississippi Department of Environmental Quality (formerly the Mississippi Bureau of Pollution Control and hereinafter referred to as the Mississippi DEQ) has documented that CERCLA hazardous substances have been released at these sites. In fact, according to internal documents of the Mississippi Department of Environmental Quality it has been determined that the sites meet "superfund category status". Further, the Mississippi DEQ has reported these sites to the U.S. Environmental Protection Agency as potential uncontrolled hazardous waste sites.

4. Mr. Cooper upon discovering the contamination, immediately reported the sites to Mississippi DEQ who began their own investigation. Mr. Cooper also participated in the investigation by organizing digs with heavy equipment to remove buried waste and having testing done by analytical chemists. Mr. Cooper incurred and paid thousands of dollars in costs associated with earth moving equipment used to dig up contaminated soils and drums and analytical testing.

5. There is overwhelming evidence in the record that wastes from the Cain, *Carter*, and Batieste sites have traveled offsite into cemetery bayou which contaminated Cooper property. The following tables illustrate just some of the *particularized findings* present in the record which establishes that hazardous and toxic substances have *invaded* the Carter and Cooper properties. The following tables based directly on data summaries compiled by the Mississippi DEQ and petitioner's expert analytical chemist, Mrs. Wilma Subra, completely refutes the factual basis for the Court's dismissal of the Cooper plaintiffs common law and CERCLA claims. These results are all independently admissible and not subject to a Rule 703 attach.

PETITIONER COOPER DATA:

Location	Compound Hazardous Substance * Yes/no	Amount	Above Background Y/N At or Above EPA Standards** Y/N
Cooper Well	Cadmium Y	10,20 ug/l	Y Y
Cooper Well	Mercury Y	3 ug/l	Y Y
Cooper Well	Selenium Y	30,17. 1 ug/l	Y Y
Cooper Well	Arsenic Y	12,12 . 6,3 ug/l	Y N
Cooper Well	Phenol Y	100,1. 2 ug/l	Y ?
Cooper Well	Benzene Y	2480 ug/l	Y Y
Cooper Stream	Arsenic Y	70,73 ug/l	Y Y
Cooper Stream	Cadmium Y	10,20 ug/l	Y Y
Cooper Stream	Lead Y	50,42 ug/l	Y Y
Cooper Stream	Selenium Y	42,8 ug/l	Y Y
Cooper Stream	Benzene Y	551 ug/l	Y Y

DATA SUMMARY BY MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY AND MRS. WILMA SUBRA;* 40 CFR §302.4 table, ALL COMPOUNDS ALSO PRIORITY TOXIC POLLUTANTS ; **40 CFR §141.32(e),§141.63

PETITIONER CARTER TOXIC COMPOUND DATA:

Location	Hazardous Substance* Yes/no	Amount	Above Background Y/N At or Above EPA Standards ** Y/N
Carter Soil	Arsenic Y	50 mg/L	Y Y
Carter Soil	Barium Y	910 mg/L	Y Y
Carter Soil	Cadmium Y	1.69 mg/L	Y Y
Carter Soil	Chromium Y	134 mg/L	Y Y
Carter Soil	Lead Y	294 mg/L	Y Y
Carter Drum Samp.	Arsenic Y	275, 70 mg/L	Y Y
Carter Drum Samp.	Barium Y	160, 140 mg/L	Y Y
Carter Drum Samp.	Cadmium Y	1.69 mg/L	Y Y
Carter Drum Samp.	Chromium Y	101 mg/L	Y Y
Carter Drum Samp.	Lead Y	161, 7 mg/L	Y Y

*40 CFR §302.4 table,(toxic waste) ALL COMPOUNDS ALSO RCRA HAZARDOUS WASTES (40 CFR §261.33) and PRIORITY TOXIC POLLUTANTS

** 40 CFR § 261.24

PETITIONER CARTER HAZARDOUS SUBSTANCE DATA:

Location	Compound	Hazardous Substance*
Carter Soil	Acetone	Yes
Carter Soil	Ethyl benzene	Yes
Carter Stream Sediment,Drum Contents.	Chloroform	Yes
Carter Stream Sediment,Drum Contents.	Toluene	Yes
Carter Soil, Stream Sediment, Drum contents	Chrysene	Yes
Carter Drum cont.	Benzo(a)pyrene	Yes
Carter Drum cont.	Benzo(ghi)perylene	Yes
Carter Drum cont.	Nitrodiphenyl amine	Yes
Carter Drum cont.	Xylene	Yes

*40 CFR §302.4 table

5. Respondent Armstrong filed a motion for summary judgment on all issues in the case pursuant to F.R.C.P. 56(c) accompanied by requests to strike petitioners expert witnesses pursuant to F.R.E. 703. Respondent argued that the levels of pollution which had been discovered did not pose a public health threat. Armstrong at no time argued that no hazardous substances were dumped at petitioner Carters farm. Armstrong also at no time contested the qualifications of the plaintiffs experts.

6. Petitioners presented the District Court with the following expert testimony in opposition to the motion for summary judgement:
Dr. George, director of toxicology at Tulane Medical center stated:
"Mr. Wesley Cooper's well water and the stream sample at his property site contained non-natural amounts of natural substances, some of which are known to cause cancer. These compounds are part of the Armstrong R[illegible] Waste Stream as identified in an internal memorandum from Armstrong and are found at the Cain, Carter and Batieste sites...That ***after personally visiting and viewing the sites, observing rusted barrels containing wastes being excavated at the Carter site*** and reviewing test results of other samples from the sites **there is *no doubt in my mind* that *hazardous*,** toxic and/or carcinogenic ***compounds* were released** into the environment by Armstrong rubber Company **at the** Cain, ***Carter*** and Batieste ***sites***.",[1](emphasis added).

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[1] Dr. George testified in his deposition that, the finding of these hazar dous substances at the Cain, Carter and Batieste sites, the finding of the same substances in monitoring wells, str eam samples, stream sediments and in Mr. Cooper's well, lead him to the logical and inescapable conclusion that the gr ound water had been impacted by these sites and that Mr . Wesley Cooper 's well contained remnants of the defendant's hazar dous waste stream.

A review of Dr. George's deposition would establish that at the Carter site,"arsenic and chr omium were above the EPA toxic values in soil." Dr. George also testified that the sediment in the Cemetery Bayou which flows thr ough Mr. Cooper's plantation, contained chlor oform, methylene chloride, toluene,

Mrs. Wilma Subra, an analytical chemist, performed testing at the sites and reviewed the analytical data compiled by both parties and the State of Mississippi. Mrs. Subra relying on this hard data, which is independently admissible and not subject to a Rule 703 attack, stated unequivicobly that Hazardous substances and wastes were deposited on petitioner Carters farm.[2]

Dr. Ralph Pike, an assistant vice-chancelor at Louisiana State University, and a chemical engineer confirmed Mrs. Subra and Dr. Georges opinions as to property contamination of the plaintiffs properties.[3]

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chloral benzene, xylene. Dr. George testified that these are above the EPA standards. Dr. George found at the Cain site, the following cancer causing agents: benzopyrene, chloroform, methylene chloride, naphthalene, nitrodisomines, arsenic, cadmium, chromium, lead, which exceeded the EPA toxic standard. Dr. George further testified that arsenic, chromium and nickel were found in monitoring wells around the site. Dr. George found that the presence of these compounds at the sites and in the water were a significant problem because the people in the area drink ground water through their wells.

Dr. George specifically discussed which of the compounds he felt had migrated to the ground water. Dr. George felt that the presence of these compounds at the site and in the ground water, especially since some were known to cause cancer, were of serious concern and that significant amounts of said chemicals were present at the Carter and Cain sites. He specifically described how at the Cain site, chromium was found twenty times higher than the EPA standard. R-Vol. 8, page 3006. Dr. George unequivocally stated that the tested sites were dirty and had to be cleaned up. The defendants are unable to refute these facts.

2 In her affidavit Mrs. Subra stated, "As a chemist who has reviewed all the pertinent testimony, test results and personally viewed the sites in question, there is no question in my mind that there has been a release of hazardous, toxic and carcinogenic compounds at the Cain, *Carter* and Batieste sites. The pertinent testimony in question and the undisputed test results and facts establish conclusively that, in fact, the Armstrong Waste Stream contained hazardous, toxic and carcinogenic chemicals and that said chemicals were deposited at the Cain, *Carter* and Batieste sites. Therefore, any decision to the contrary would not be supported by the record as I have reviewed it."

3 Dr. Pike testified in his Rule 56(e) affidavit as follows: "As a chemical engineer who has reviewed all the pertinent testimony, test results and personally viewed the sites in question, there is no question in my mind that there has been a release of hazardous, toxic and carcinogenic compounds, at the Cain,

Dr. Aughenbaugh, a full professor of geological engineering at the University of Mississippi confirmed that the hazardous wastes which were openly dumped by respondent have reached the ground water. He confirms that these hazardous substances have impacted the Cooper homestead.[4]

The Petitioners also provided the Court with the affidavit and appraisal of Mr. William Upchurch a licensed real estate appraiser who testified that the Carter farm and the Cooper homestead had sustained property damage and devaluation as a result of Respondents pollution. Respondent produced no expert reports and no evidence to contradict this opinion.

7. On this record the District Court granted summary judgment and entered a final judgment dismissing petitioners claims with prejudice. The District Courts primary ground was that all of the Plaintiffs expert testimony was

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Carter and Batieste sites. . . to my knowledge, the defendants, nor BPC have ever disputed these facts."

[4] Dr. Aughenbaugh in his Rule 56(e) affidavit stated: "The probable paths of the pollutants as described above are supported by the scientific literature and basic hydrogeologic principles. The movement of water and liquids from the surface to the subsurface takes many different routes. The fact that Cooper's well water when tested has shown pollution by many different elements that are confirmed to be present at the Carter, Cain and Batieste dump sites definitely establishes the pollutants have migrated by one or more of the routes outlined above from the dumps to the well. No amount of modelling based upon a multitude of assumptions not relevant to the hydrogeology can prove otherwise...The issue now is not if the hazardous wastes dumped at the Cain, Carter and Batieste sites have caused pollution of the groundwater and the wells being supplied from it but rather what has been the magnitude of this pollution. Armstrong Rubber Company reportedly has been doing uncontrolled dumping at the Cain, Carter and Batieste sites from about 1943 to 1971. The company produced approximately 1 ton of hazardous wastes a month and much waste oils. These waste materials were regularly taken to the sites and dumped. The magnitude of the wastes dumped is tremendous. Much of these wastes were liquids that immediately would start flowing down the bayous or percolate into the Losses."

inadmissible under the Federal Rule of Evidence 703 and that Plaintiffs had failed to prove sufficient contamination to establish a public health threat. (A38). The District Court in dismissing the Plaintiffs property damage claims found that the ground water was not contaminated and that the sites did not indicate a public health threat existing in the use and consumption of the area ground water. "The Court thus concludes that Upchurches assumption of hazardous waste and contamination of the Carter property are not admissible". (A35). The District Court, ignoring the testimony and affidavits of Plaintiffs expert toxicologist, chemist, and chemical engineer dismissed plaintiffs common law property damage, nuisance, and trespass claims. (A36).

8. Thus, the District Court ruled that Petitioners could not state a cause of action for negligence, nuisance or trespass under the Mississippi Common Law. The District Court further held that Plaintiffs could not state a CERCLA cause of action in order to recover response costs; because, Plaintiffs must show that the hazardous substances pose an "imminent and substantial threat to the public health and welfare", relying on a 1989 Oklahoma District Court case, and a 1986 Rhode Island District Court decision (A38). *See United States v. Hardy*, 733 Fed. Supp. 1424 (W.D.OKL. 1989); *Violet v. Picalo*, 684 Fed. Supp. 1283, (R.I 1986).

9. The District Court held that "Plaintiffs did not identify any hazardous chemicals present at the home sites which present any significant risk to health." (A39) The District Court ignored the analytical results in the record and the expert testimony which has partially been presented to this court in the Petitioners statement of the case. The Respondent and the District Court never denied that there were hazardous substances on the petitioner Carters' site. The District Court apparently felt that the hazardous substances did not pose an imminent substantial threat.[5]

10.The District Court, without oral argument, without an evidentiary hearing, ignored and/or disallowed the tes-

timony of five (5) of Petitioners highly qualified experts, and refused to allow Petitioner to recover the thousands of dollars of response costs indisputably incurred as a result of the investigation surrounding the disposal of respondents admitted hazardous waste stream. The District Court further taxed Petitioners with costs of $11,414.00.

11. The case, containing 14 full volumes of materials, test results, expert reports and factual statements of witnesses, was taken to the Court of Appeals. In the Fifth Circuit, the Plaintiffs attacked the District Courts erroneous and improper findings of fact.[6] Petitioners further alleged that the District Court had ignored clear legislative intent and clear jurisprudence from the Court of Appeals when it dismissed Plaintiffs C.E.R.C.L.A. claim,[7] and clearly erred when it relied on an opinion from another jurisdiction related to,

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5 The District court ignored Dr. Pike's affidavit in which he stated that r espondent had disposed of between 1,920-4,480 dr ums of material based upon defendants hazardous waste manifests. A review of the petitioners statement of the case cited above, in view of memorandum opinion and or der of the District Court would establish evidence of clear judicial overr eachingand failure to follow this courts requirements for summary judgments under r ule 56(c). See *Anderson v. Liberty Lobby, Inc.*., 477 U.S. 242(1986).

6 A review of the District Courts opinion would establish beyond doubt that the Court simply chose to be the ultimate trier of fact and law; disr egarding its mandate under Article 7 of the Constitution, 28 U.S.C §1446, and this Court's jurisprudence. The Court accepted the unsupported factual allegations of Respondent without review of the test results, expert reports and the statements of the Mississippi Department of Envir onmental Quality establishing hazar dous substance on the Carter homestead and the Cooper str eam and well.

7 It is incontrovertible that the District Court completely sidestepped the controlling authority in the Fifth Cir cuit on C.E.R.C.L.A in formulating it's Cer cla test. See, *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989). The District Court's test relied on older district court opinions fr om another Circuit and *Amoco* was never cited in the opinion.

plaintiff's Mississippi common law Nuisance claims.[8] Pe itioners argued in the Appellant Court, as they now argue here, that the evidentiary rulings applied to petitioners expert testimony were inappropriately applied to evidence relevant to the property damages issues. Petitioner pointed the Appellant Court directly to the relevant parts of the record which indisputably established contamination of the Carter site and the Cooper well stream.

12. It should be noted that the Court of Appeals had consolidated two cases, and that the opinion disposes of two cases. Those cases are *James Berry, et al v. Amstrong, et al, and Wesley Cooper, et al v. Armstrong*. This petition for Certiorari is being filed by the plaintiffs in Cooper. Unfortunately, consolidation of the appeals is a cause of the error of the Court of Appeals since the records were indisputably confused by the Appellate Court. The Court of Appeals affirmed the District Court's summary dismissal of the plaintiff's claims by relying on the now overruled ***frye*** rule and without performing a de novo review of the record (A10).

13. Petitioners timely requested a rehearing based upon the clear error in interpreting the record, the apparent confusion of the Court in differentiating the distinct records in the consolidated appeals, and *Daubert et ux v. Merril Dow*, ___U.S.___ 113 S.ct 2786 (1993). Petitioners suggested that

[8] The District Court's incongr uous legal reasoning becomes apparent where reliance was placed on a 1952 nuisance case involving a cemetery and a case from a different circuit. (A36-37)See, *Dennery v. Hughes*, 59 So.2d 316 (Miss. 1952); *Shutes v. Platte Chemical Company*, 564 So.2d 1382 (Miss.1990); *Phillips v. Davis Timber Company*, 468 So.2d 72 (Miss.1985). *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303 (3rd Cir. 1985).

Mississippi has a 100 year line of cases inapposite to the r easoning of the district court. See, Shutes v. PlatteChemical, Co., 564 So.2d. 1382 (Ms. 1990); *Phillips v Davis Timber Co.*, 468 So. 2d 72 (Miss. 1985); *Cochran v Consumer's Wirebound Box* Co., 149 So. 2d 844 (Miss. 1983); *City of Jackson v Filtrol Corp.*; 624 F.2d 1384 (5th Cir. 1980); *Love Petroleum, Co. v Jones*, 205 So. 2d 274 (Miss. 1967); *Central Oil Co. v Shows*, 149 So. 2d 306 (Miss. 1963); *City of Oxford v Spears*, 87 So. 2d 914 (Miss. 1956); *Young v Weaver*, 32 So. 2d 202 (Miss. 1947); . *Masonite Corp. v Steede*, 23 So. 2d 756 (Miss. 1945); *Masonite Corp. v Dennis*, 168 So. 613, 614 (Miss. 1936); *Masonite Corp. v Burnham*, 164 Ms. 840, 858-860, 146 So. 292, 296 (Ms. 1933); *Mississippi Mills Company v Smith*, 69 Ms. 299, 303-305, 11 So. 26, 27 (Ms. 1891).

since *Daubert* clearly addressed the evidentiary issues in a new light, that the evidence should be reevaluated by the Court, or the case should have been remanded to the District Court. In an apparent refusal to abandon *Frye* and comply with this Courts authority, the Court of Appeals without comment refused to conduct a reevaluation of the record in light of *Daubert*. As will become apparent, the legal basis of the Appellate Court's opinion falls in light of *Daubert* and the independently admissible facts which indubitably establish extensive contamination of the petitioners properties.

14. In a decision which can only be described as a pure reflection of a result oriented decision making process, the Fifth Circuit, (in an opinion authored by a fellow district judge from Texas), affirmed the decision of the District Court. However, the Fifth Circuit did not affirm the decision of the District Court based upon the facts and law as cited by the District Court in its opinion. Interesting enough, the Court of Appeals simply changed the factual findings of the District Court in order to legally justify dismissal of petitioners claims. The Court of Appeals decided that there were not contaminates present and then relied on jurisprudence which had been ignored by the District Court, but cited in Plaintiffs brief to affirm the dismissal of Plaintiffs property damage claims and denial of response costs. The Appellate Court completely ignored the testimony of Dr. George and Mrs. Suber which was based on first hand observations and which relied on otherwise admissible test results to establish property contamination. The Appellate Court held the Petitioners failed to provide the District Court with sufficient admissible evidence that pollutants were in Plaintiffs land or in their ground water to establish a genuine issue of material fact. The Appellant Court at one point in its decision refused to admit that any contamination was present on Petitioner Carters farm; even though, the Appellant Court makes several references to the 'Carter site.' In

one part of the opinion that the Appellant Court admits that there is a "Carter site", yet later in the opinion finds that Petitioner Carter could not establish any contamination on his property.[9] There can be no question that the Appellant and District Court opinions in this case will not serve to fulfill the legislative intent in passing CERCLA.

If anything, the Appellant Courts refusal to acknowledge contamination which is indisputably present in the record and its decision that Petitioners can not recover response costs will do nothing but to dissuade "any persons" in the Fifth Circuit from bringing private party cost recovery actions.

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[9] The Appellant Court stated:

"However, Carter claims that Armstrong also dumped barrels containing toxic chemicals without his knowledge, and that this dumping reduced the value of his land." 989 F.2d at 828.

The Appelate Court seems to suggest that Mr. Carter's claim of toxic dumping on his property is disputed. It is not. Armstrong admitted in answers to interrogatories and in it's deposition, and the testing by the State of Mississippi and Ms. Subra have verified, that hazardous and toxic substances from Armstrong's waste stream were deposited on the plaintiff Carter's homestead.

The Court of Appeals went on to state, "The summary judgment record contains the results of numerous tests performed by state and federal agencies. **These tests found no evidence that the Cain, Batieste, and Carter sites contaminated the adjacent properties, property owned by plaintiffs**....In both Berry and Cooper, plaintiffs failed to provide evidence of tests performed on plaintiffs' properties that showed **particularized findings** that hazardous or toxic substances were present...The Cooper and Berry plaintiffs failed to show such evidence of an '**invasion**' by Armstrong to withstand summary judgment." 989 F.2d at 828, 830 (emphasis added)

The Carter site is owned by the plaintiff Mr. Carter! There is indisputable evidence in the record that the Carter site is contaminated with Armstrong's waste which indisputably contained hazardous and toxic substances. There is also overwhelming evidence in the record that wastes from Cain, Carter, and Batieste traveled offsite into cemetery bayou which contaminated Cooper property. Mr. Cooper stated in opposition to Defendant's Motion for Summary judgment,

"All of the run off from the Cain site goes into Cemetery Bayou, which is the southern boundary of my property. It was here that the State of Mississippi tested the stream beside my property and did find contaminants present".

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DECIDE WHETHER FEDERAL COURTS POSSESS INHERENT JUDICIAL POWER TO ALTER ACTS OF CONGRESS, TO IGNORE EVIDENCE, AND, IN A DIVERSITY CASE, TO ERADICATE 100 YEARS OF STATE COURT JURISPRUDENCE.

This case provides this court with an opportunity to speak with a clear voice about the limits of inherent judicial power and the disposition of complex litigation involving federal and state law issues pursuant to Federal Rule of Civil procedure 56(C). In a long line of cases, the Fifth Circuit has repeatedly erected barriers to Plaintiffs in toxic tort cases through a result oriented reinterpretation of the federal rules of civil procedure and the federal rules of evidence.[10] Petitioners do not contend that all the decisions in these particular cases were wrong. What Petitioners do contend is that the line of these decisions, many of the judicial underpinnings of which were eliminated or modified by *Daubert* evidence a policy of the Fifth Circuit which mitigates against toxic tort cases. That judicial policy has now been expanded beyond the bounds of the seventh amendment, the federal rules of civil procedure, the federal rules of evidence, and CERCLA to encompass nuisance, property damage, and trespass claims under state law. These areas of law, excluding the response cost claim, predate the constitution and are an area of common law specifically reserved to the states. The issue of nuisance, trespass and the resultant damages have traditionally been a question of fact to be determined by a jury comprised of members of the community.

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10 *See Christophersen v. Allied-Signal Corp.*, 939 Fed. 2d 1106 (5th Cir. 1991), *cert. denied, Christophersen v. Allied-Signal Corp., 112 S. Ct. 1280 (U.S. 1992); Brock v. Merrell Dow Pharmaceuticals,Inc.*, 884 F.2d 167 (5thCir. 1989),cert. den., 494 U.S. 1046 (1990), *Randolph v. Laeisz*, 896 F.2d 964 (5th Cir.1990) *Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121, (5th Cir. 1988), *Osburn v. Anchor Laboratories, Inc*, 825 Fed. 2d. 908 (5th Cir. 1987), cert. den. 485 U.S. 1009, (1988) *Vitterbro v. Dow Chemical Company*, 646 F.Supp. 1420, Affmd., 826 F.2d, (5th. Cir.1987). *In re Air Crash Disaster at New Orleans"*," 795 F.2d. 1230 (5th Cir. 1986).

This policy was expressly pointed out and criticized by the Four member dissent in the hotly contested en banc decision of the Fifth Circuit in *Christophersen v. Allied-Signal Corp.*, 939 F.2d. 1106, (5th Cir. 1991) (*en banc*). Judge Reavley for the dissent stated, "The judges of this court have in recent years been sending warning signals about their displeasure with expert testimony. Today the court takes hold of expert testimony by taking over. The per curiam opinion effectively allows judges to decide the 'reliability', 'weight', 'and relative merit of expert opinions', at least in toxic tort cases. And with such control, we signal a willingness to increase the proof and persuasion burdens of the disfavored party. The author of the per curiam claims to introduce no new concepts to our jurisprudence. Surely my colleagues know better, or at least they should know that their use of these concepts confuses the admissibility of evidence with the sufficiency of evidence, changes the rules of evidence without benefit of amendment, denies Mrs. Christophersen her right to trial by jury, and eliminates substantive rights in tort cases where federal courts have only diversity jurisdiction."

After being advised by this court that the legal underpinnings of the *Christofferson* decision were incorrect, the fifth Circuit refused to remand or rehear the Cooper and Carter cases in light of Daubert.[11]

II. THE FIFTH CIRCUIT IGNORED LEGISLATIVE INTENT AND ENGAGED IN JUDICIAL LEGISLATION IN DISMISSING PETITIONERS RESPONSE COST CLAIMS UNDER C.E.R.C.L.A (42 U.S.C. §9601).

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11. It was specifically pointed out to the panel upon r equest for rehearing that its' reliance upon *Frye*, *Christofferson* and F.R.E. 703 as providing a legal basis for affirming this case had been specifically overr uled by this court.

The law governing this cause of action was passed by Congress in order to effectuate the discovery, inspection and remediation of disposal areas which contained hazardous substances and/or which may present a threat to the public health or the environment. H.R. Rep. 1016, 96 Congress 2nd Session, P.T. I at 17-18 (1980), 1980 U.S. Code, Congressional and Administrative News 6119, 6120. See, Grad, *A legislature history of the Comprehensive, Environmental Response, Compensation and Liability (Superfund) Act of 1989*, 8 Colum J. Envtl. L. 1 (1982)

In order to present a prima facia CERCLA claim, the fifth circuit had previously stated, "a plaintiff must prove (1) that the site is a 'facility' as defined in Section 9601(9); (2) that the defendant is a responsible person under Section 9607(a); (3) that a release or threatened release of hazardous substance has occurred; (4) that the release or threatened release has caused plaintiff to occur response cost... If plaintiff establishes each of these elements and the defendant is unable to establish the applicability of one of the defenses listed in Section 9607(b), the plaintiff is entitled to a summary judgment on the liability issue..." *Amoco Oil, Inc. v Borden, Inc.*, 889 Fed. 2d 664, 668 (5th Cir. 1989); See also, *U.S. v. Marisol, Inc.*, 725 F.Supp 833 (M.D. Pa. 1989); *U.S. v. Hardage*, 733 F.Supp 1424 (W.D.Okla 1989).

Here instead of affirming the test of the district court which required an immanent and substantial threat, the fifth circuit rearranged the first prong of the test so that it now requires that the contaminants be on plaintiffs property for the site to constitute a facility under the act.[12] (A13). The

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12. The panel specifically found:
"The district court dismissed the plaintiffs' CERCLA claims because, despite almost two years of discovery, plaintiffs failed sufficiently to prove the presence of any hazardous substances on their property to withstand summary judgment. A site cannot be a facility unless a hazardous substance has been deposited stored disposed of or placed or otherwise came to be located. . . at the site. Amoco, 889 F.2d at 668, n. 4. As a matter of law, plaintiffs cannot meet the first requirement of a CERCLA claim. In both Berry and Cooper, *plaintiffs failed to*

test applied by the Fifth Circuit and the award of over $11,000.00 in costs against petitioners must be rejected and reversed in order to avoid frustrating the attempts of concerned citizens in the Fifth Circuit to clean up and protect their health and environment. As it now stands, the test applied by the Fifth Circuit in this case could govern the prosecution of all future CERCLA actions in this circuit, thereby frustrating congressional intent and the clear policy of the United States. Nowhere in the statute passed by congress does it say that response costs, to be recoverable, must be incurred in the testing or cleaning of the plaintiffs property.

The fifth circuits ruling in this case directly contradicts the ruling of the first circuit in *Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d. 1146 (1st. Cir. 1989), and its' progeny in other circuits. In Dedham, supra, after an exhaustive review of the legislative history of the CERCLA, the first circuit correctly interpreted the statute to allow recovery of response costs if there has been a release or threatened release of a hazardous substance irrespective of whether the plaintiff owned the land upon which the contaminates were released. The first circuit stated, "A literal reading of the statute imposes liability if releases or threatened releases from defendants facility cause the plaintiff to incur response costs: it does not say that liability is imposed only if the defendant causes actual contamination of the plaintiff's property... To our knowledge every court that has addressed this issue, with the exception of the district court in the instant case, has held that it is not necessary to prove actual contamination of plaintiffs property by defendants waste in order to estab-

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provide evidence of tests performed on plaintiffs' properties that showed particularized findings that hazar dous or toxic substances were present. The district court's summary judgment dismissing plaintif fs' CERCLA claim is therefore affirmed." (A12)(emphasis added) *Dedham*, 3 F.3d. at 1152-1154.

lish liability under CERCLA Dedham, 889 F.2d. at 1152,1154. See also, *United States v. Alcan Aluminum*, 990 F.2d 711, 721 (2nd. Cir. 1993); *United States v. Alcan Aluminum*, 964 F.2d 252, 265 (3rd. Cir. 1992) The fifth circuit without any legal authority cited, apparently rejected Dedham and its progeny, and created its own much more restrictive test. The fact that there is a conflict among circuits on the issue of liability in CERCLA was confirmed by the fifth circuit in *Matter of Bell Petroleum Services, Inc.*, 3 F.3rd. 889 (5th. Cir. 1993). In *Matter of Bell*, supra, the fifth circuit claimed to have the authority to recast the joint and several liability provisions of the CERCLA as drafted by congress to develop its' own equitable system. In the conclusion of his dissent, Judge Parker stated, "contrary to congressional intent and traditional judicial doctrine -not to mention the bedrock principle of a prudent separation of federal governmental powers- The majority has usurped for itself the special powers of the executive and the trial court as well. *Matter of Bell*, 3 f.2d at 922.

Petitioners have indisputably established that defendant was responsible for disposing in excess of one million pounds of hazardous substances from this facility during the relevant time periods which has caused petitioners to incur response costs. It is undisputed that Armstrong's Waste Stream is and was hazardous, that Armstrong was the only manufacturer of tire and rubber products in Natchez, Mis sissippi, and that Armstrong disposed of its hazardous waste stream for 40 years by open dumping directly into the environment. It is respectfully suggested that these facts establish a release of a hazardous substance to invoke the remedies of CERCLA as a matter of law. [13]

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13. According to the District Court in *City of New York v. Exxon Corp.*, 766 F.Supp 177 (S.D. N.Y. 1991), Any substance containing cadmium, chr omium or lead is a **"hazardous substance"** under CERCLA. In this case it is irr efutable that defendants' hazardous waste stream contained cadmium and lead and that these substances have been found on the Carter farm and in the Cooper well and/ or stream above E.P.A. standards. *City of Philadelphia v. Stephan Chem. Co.*, 544 F.Supp

In dismissing this case, the Federal Courts have condemned this community to live with these materials in the open environment without a judicial resolution of the communities safety and health concerns. Plaintiffs are entitled to a trial on the declaratory judgment action as to those sites under CERCLA. 42 U.S.C. §9613(g)(2), 40 C.F.R. §300 et. seq. See *Gaba, Recovery Hazardous Waste Clean-Up Cost: The Private Cause of Action Under CERCLA* Ecology Law Quarterly, 13:181, page 215.

Congress recognizing the fact that the lack of resources available to private parties would frustrate application of CERCLA, requires only that parties sustain some response costs to be entitled to a declaratory judgment on liability. *State ex rel Brown v. Georgeoff*, 562 F.Supp 1300 (N.D.Ohio 1983); *Kelly v. Thomas Solvent*, Co., 727 F.Supp 1532 (W.D. Mich. 1989); *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F.Supp 93 (D.Mass 1990); *U.S. v. Hardage, 733 F.Supp 1424* (W.D. Okla 1989)

The record contains overwhelming and undisputed proof that hazardous substances were released at these sites. Defendant's truck drivers admitted dumping hazardous materials at these sites. In fact, one truck driver described the fires which occurred at the dump sites when volatile organics were discharged. [14]

According to Ms. Subra, plaintiff's expert chemist, "It is irrefutable that massive quantities of hazardous and toxic

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1135 (E.D. Pa 1982). See also, *U.S. v. Alcan Aluminum Corp.*, 755, F.Supp 531 (N.D. N.Y. 1991), *Walls v. Waste Resource Corp.*, 761 F.2d. 311 (6th Cir 1985)

14. The Court of Appeal ignored the public health threat issues and failed to discuss or take into account the undisputed fact that all of the sites sit atop a designated Sole Source Aquifer. According to the EPA, "The Southern Hills Regional Aquifer System is a principle source of drinking water for an area comprising ten parishes in Southeast Louisiana and all or parts of 14 counties in Southwest Mississippi and that this Aquifer, if contaminated, would create a significant hazard to public health..." Federal Register Vol. 53 No. 130, Thursday July 7, 1988 pg. 25538.

substances were placed at the Cain, Carter and Batieste sites. In fact, the State of Mississippi confirms this in their orders which were not opposed". [15]

An example of the appellate court's inability to grasp the issues at hand is it's insistence that no hazardous wastes were present at the Carter farm. It was the responsibility of the appellate court to completely review this record de novo and to take control of this litigation, in order to insure that the public policy of the United States was followed. This policy requires the judicial protection of the health and environment of Adams County and the sole source aquifer. If the appellate court's decision is allowed to stand, nothing further will be done and Armstrong would have successfully avoided liability for cleaning up its hazardous waste sites.

III. THE FIFTH CIRCUIT APPLYING A RESULT ORIENTED DECISION MAKING PROCESS ERRONEOUSLY DETERMINED THAT RESPONDENTS WERE ENTITLED TO A JUDGMENT, AS MATTER OF LAW, ON PETITIONERS STATE LAW CLAIMS AND ERRONEOUSLY REFUSED TO GRANT THE RELIEF REQUESTED IN THE PETITION FOR REHEARING EVEN AFTER BEING CONFRONTED WITH THE REALITY THAT MOST, IF NOT ALL OF IT'S FACTUAL AND LEGAL FINDINGS WERE NOT SUPPORTED BY THE RECORD OR THE JURISPRUDENCE.

The petitioners would respectfully suggest, that a review

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15. Mrs. Subra testified: "The sites identified must be cleaned up to pr otect the public health and envir onment of Adams County. However, in order to do a remedial plan which would be submitted to the pr oper governmental authorities, a tremendous amount of resources would have to be available. Such r esources in private party cases ar e generally not available until ther e has been a finding of liability. Once liability is established, the necessary testing and char - acterization of the sites can begin. Once this is accomplished, a r emediation plan will be provided to the governmental authorities and the work will be put

of the facts in this record, will lead to the inescapable conclusion that the appellate court improperly made findings of fact which were not supported by the record in violation of the seventh amendment, 28 U.S.C §1442, and this court's clear jurisprudence. *Anderson v. Liberty Lobby*, Inc., 477 U.S.242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) These findings of fact were disputed and supported only the defendant in direct contradiction to the jurisprudence interpreting Rule 56 of the Federal Rules of Civil Procedure.

The court of appeals refused to apply Mississippi statutory and common law to the facts in conformance with the jurisprudence of the Mississippi Supreme Court as is required by this court in diversity cases. *Erie Railroad v. Thompkins*, 304 U.S. 64 (1938). In reviewing a District Court's summary dismissal of a complaint, the record must be reviewed in light of the fact that the District Court has determined that the plaintiffs cannot avail themselves to their constitutional rights to a jury trial.

In affirming a summary judgment, an appellate court should exercise great care in examining the record for all evidence, both direct, and circumstantial which supports the non-moving party's position. The appellate court, as did the district court, has an obligation to inquire into all factual assertions present in the record. In this case, the appellate and district court is totally failed to follow the correct factual analysis based on the record as mandated by the Constitution and this Honorable Court's jurisprudence.

It was incumbent upon the appellate court to review the entire record in this case under the same standards which should have guided the district court. The evidence in this case should have been independently reviewed in the light most favorable to the petitioners with the realization that

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up for bid. At that time, a government appr oved private party cleanup will begin as envisioned by the Compr ehensive Environmental Response, Compensation and Liability Act (Cercla)."

summary judgement is rarely appropriate in strict liability and negligence cases.

Mississippi Law recognizes that the defendant's actions need only be a proximate cause or contributing cause of the force which is a substantial and contributing factor in producing the harm. *Jackson v. John-Mansville Sales Corp.*, 727 Fed. 2d 506 (5th Cir. 1984); Vacated and modified, 781 F.2d 394, *cert. denied, Johns-Manville Sales Corp. v. Jackson*, 478 U.S. 1022 (1986); *New Orleans & N.E.R. Co. v. Burge*, 2 So. 2d 825 (Miss. 1941). Further, if the defendant's negligence put into operation the force which caused the harm, even if that force concurred with other causes which produces the injury, the defendant is still liable. *Oliver v. Miles*, 110 So. 666, 50 ALR 357 (Miss. 1926); *Planter's Wholesale Grocery v. Kincade*, 50 So. 2d 578 (Miss.1951); *D & W Jones, Inc. v. Collier*, 372 So. 2d 288 (Miss. 1979).

In a nuisance and/or trespass case, Mississippi Law only requires a showing that defendant's activities in disposing of its toxic waste has caused damage to plaintiff's legally protected interests. *Young v. Weaver*, 32 So. 2d 202 (Miss. 1947); *City of Oxford v. Spears*, 87 So. 2d 914 (Miss. 1956); *Phillips v. Davis Timber Co.*, 468 So. 2d 72 (Miss. 1985).

Under the doctrine established in *City of Oxford*, supra and *Phillips*, supra, it is irrelevant whether the pollution is harmful. Plaintiffs need only show an invasion of their rights. It is even irrelevant whether plaintiffs establish actual damages since Mississippi law recognizes that even absent actual damage, when there has been an invasion of plaintiff's interest, plaintiffs are entitled to nominal damages. *City of Jackson v Filtrol Corp.*, 624 F.2d. 1384 (5th Cir. 1980); *Cochran v. Consumer's Wirebound Box*, 149 So. 2d 844 (Miss. 1983); *Central Oil Co. v. Shows*, 149 So. 2d 306, 311 (Miss. 1963); *Love Petroleum Co. v. Jones*, 205 So. 2d 274, 275 (Miss. 1967).

Mississippi law is clear and unequivocable that monetary damages are appropriate where a landowner's property has been impaired. *Masonite Corp. v Steede*, 23 So. 2d 756(Miss. 1945); *Masonite Corp. v. Dennis*, 168 So. 613 (Miss. 1936); *Masonite Corp. v. Burnham*, 146 So. 292, 296 (Miss. 1933); *Mississippi Mills Company v. Smith*, 11 So. 26, 27 (Miss. 1891). These monetary damages include decreased market value caused by the stigma associated with the public discovery that hazardous wastes were placed on a property. *Binum v. Mandrel Industries*, 241 So. 2d 629 (Miss. 1970); *Phillips*, supra, 468 So. 2d at 1379. Further, it is irrelevant whether there has been a migration of chemicals. *Edge v. City of Booneville*, 83 So. 2d 801 (Miss. 1955)

The appellate court appears to hold that the presence of hazardous substances under a citizen's home, in a citizens well, or in a citizen's stream is not a "confirmed physical property damage", under Mississippi common law. The decision is not only illogical, not supported by the case law, but defies common sense. Market value is determined by what a willing buyer would pay to a willing seller. If the buyer knows that hazardous substances are on the land, or in the streams, and is aware of the potential for clean up, common sense dictates that he will not buy or will pay much less. In this case, the analytical testing and expert testimony establish that Mr. Carters farm, and Mr. Coopers plantation have been invaded by defendant's hazardous waste.

A review of the Mississippi Supreme Court jurisprudence will establish conclusively that the plaintiffs have stated a claim pursuant to the Mississippi Common Law Doctrine of Nuisance. Plaintiffs, under the Private and Public Nuisance Doctrine, have a viable claim for property damage, annoyance, inconvenience and mental distress resulting from the defendant's activities. *See Common Law Remedies for Environmental Wrongs: The Role of Private Nuisance*, 59 Miss. Law Journal 657 (1989).

The petitioners also stated a viable claim under the doc-

trine of public nuisance. Under the doctrine of public nuisance, plaintiffs may recover the same damages as in a private nuisance case, and need only show that the defendant's activities has worked in an obstruction or injury to a right or the public. Certainly, it cannot be disputed that the public has a right not to have hazardous wastes disposed of on top of their drinking water aquifers. Also, the Mississippi Legislature has deemed the defendant Armstrong's activities with regard to waste disposal as a "public nuisance per se". See, Mississippi Statutes Ann. Sec. 17-17-17.

The citizens of Mississippi are statutorily entitled to recover damages under the public nuisance doctrine. Miss Code Annot. § 95-3-5, *Perry v. Jones*, 43 So.2d 565 (Miss. 1949). A private litigant can sue based on public nuisance when the plaintiff's injury differs in kind from those suffered by the public at large. *Maples v. Quinn*, 64 So.2d 711, 712 (Miss. 1953). In this case, the plaintiff's also sought injunctive relief under the common law for an abatement of the nuisance created by defendant's conduct.

The appellate court did not fully consider the implications of the jurisprudence from the Mississippi Supreme Court and statutes passed by the Mississippi Legislature in making it's decision. The court completely ignored and did not address petitioners rights pursuant Miss. Code Annot. § 17-17-17 which declares these dumps a public nuisance per se and statutorily provides plaintiffs with a cause of action.

CONCLUSION

The abuse of federal judicial power presented in this writ, mitigates in favor of this Courts granting the petition. Appelate Courts' should not be allowed to engage in such flagrant abuse of the policies of the United Staes as encompassed within the statutory provisions enacted by congress and this courts jurisprudence.

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APPENDICES

APPENDIX A

Decision of the United States Court of Appeals for the Fifth Circuit, affirming the district court's grant of summary judgment for respondent, dated May 3, 1993.....A1

APPENDIX B

Memorandum and Order of the United States District Court for the Southern District of Mississippi, granting summary judgment for respondent, dated August 13, 1991.....A15

APPENDIX A

James BERRY, Sr., et al., *Plaintiffs-Appellants*, v. The ARMSTRONG RUBBER COMPANY, *Defendant-Appellee*. J. Wesley COOPER, et al., *Plaintiffs-Appellants*, v. The ARMSTRONG RUBBER COMPANY, *Defendant-Appellee*.

NOS. 91-1934, 91-1996.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

May 3, 1993, Decided and Filed

Before: REYNALDO G. GARZA and GARWOOD, Circuit Judges, and ROSENTHAL, District Judge. *

OPINION: ROSENTHAL District Judge:

1. Background

This is a consolidated appeal from a grant of summary judgment in favor of defendant Armstrong Rubber Company (Armstrong) in two separate suits. Armstrong operated a tire manufacturing plant in Natchez, Mississippi, from 1937 through 1987, when it sold the plant. Plaintiffs are individuals who live in Natchez, Mississippi. It is undisputed that from 1937 through the 1970s,

* District Judge of the Southern District of Texas, sitting by designation.

Armstrong dumped waste materials from this plant into various sites around the Natchez area. It is also undisputed that several of these sites are located near the areas in which plaintiffs live. Plaintiffs claim that this dumping left hazardous chemicals on their land and in their groundwater. Armstrong denies the presence of any harmful level of hazardous materials on plaintiffs' land or in their water.

In 1988, plaintiffs sued Armstrong in two separate cases, James Berry, et al.v. Armstrong Rubber Co., Civ.A. No. J88-0653(B), U.S. District Court, S.D. Miss., Jackson Division, and J. Wesley Cooper, et al. v. Armstrong Rubber Co., Civ.A. No. J88-0464(L), U.S. District Court, S.D. Miss., Jackson Division, alleging a right to recovery under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. @ 9601-9675, and under Mississippi state law causes of action for nuisance, trespass, personal injury, strict liability, negligence, and property damage.[1] After almost two years of discovery, the district court dismissed plaintiffs' claims, holding that plaintiffs had not produced sufficient evidence that hazardous substances were present or that such substances caused any injuries. 780 F. Supp. 1097. We affirm the rulings of the trial court.

2. Standard of Review

This court reviews the grant of summary judgment de novo, applying the sameRule 56 standards employed by the district court. *See Stout v. Borg-Warner Corp.*, 933 F.2d 331,

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[1] The Berry lawsuit initially included claims under other federal envir onmental acts and state common law nuisance claims. On May 17, 1989, thedistrict court dismissed plaintiffs' statutory claims under the federal envir onmental acts and plaintiffs' state common law nuisance claims. Plaintiffs do not appeal the dismissal of the statutory claims under federal envir onmental acts. The district court granted Armstrong's second motion for summary judgmenton July 30, 1989, dismissing all claims.

334 (5th Cir.1991). Evidentiary rulings are reviewed under a manifest error standard. *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106,1109 (5th Cir.1991), *cert. denied* -U.S.-, 112 S. Ct. 1280, 117 L. Ed. 2d506 (1992); Viterbo v. Dow Chem. Co., 826 F.2d 420 (5th Cir.1987). If the district court's ruling depended on the admissibility of certain evidence, appellate review is a two-tiered process. First, we review the evidentiary rulings under the manifest error standard, then review the trial court's summary judgment decision de novo. *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106,1109.

In granting a motion for summary judgment, the district court is not to weigh the evidence or make credibility choices. *Orthopedic & Sports Injury Clinic v. Wang*, 922 F.2d 220, 223 (5th Cir.1991). This does not mean, however, that the existence of any factual dispute will foreclose summary judgment. The dispute must be genuine, with facts on both sides of a material issue, before acourt must submit it to a jury. *See Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1088 (5th Cir.1990).

The trial court held that much of plaintiffs' expert testimony lacked sufficient probative value under Rule 703 of the Federal Rules of Evidence to overcome summary judgment for Armstrong. Viterbo v. Dow Chem. Co., 826 F.2d at 422. Rule 703 does not "make summary judgment impossible whenever a party has produced an expert to support its opinion." Viterbo v. Dow Chemical Co., 826 F.2d at 422 (quoting Merit Motors, Inc. v. Chrysler Corp., 187 U.S. App. D.C. 11, 569 F.2d 666, 673 (D.C.Cir.1977)). If the basis for the expert's opinion is so unreliable that no reasonable expert could base an opinion on that data, the opinion may be excluded in the district court's determination of whether there is a genuine issue regarding an essential element of the claim. Viterbo v. Dow Chemical Co., 826 F.2d at 422; see also Orthopedic & Sports Injury Clinic v. Wang, 922 F.2d 220, 225 (5th Cir.1991).

We conclude that the district court correctly granted defendant's summary judgment motion. Because the evidence presented by the Berry and the Cooper plaintiffs is in some respects distinct, we analyze the issues of proof as to each case separately.

3. Berry

Plaintiffs James Berry, Sr., James Berry, Jr., Dwight Berry, and Tangela Berry, live at 103 Downing Rd. in the Mayfair Subdivision in Natchez. Plaintiffs Charles and Bessie Prater live across the street at 102 Downing Rd. These plaintiffs, the Berry plaintiffs claim that their homes rest on top of and/or near fill material containing toxic wastes left by Armstrong, and that their health and property values have suffered as a result.

It is undisputed that these plaintiffs' lots have never been tested to determine whether any toxic chemicals are present. Plaintiffs admit that there is no test data of soil or water taken from their lots. Plaintiffs instead relied on expert testimony to provide circumstantial evidence of the presence of hazardous substances in a quantity sufficient to cause the alleged harm.

One of plaintiffs' experts, Dr. Ralph Pike, a chemical engineer, reviewed tests of soil samples by the Mississippi Bureau of Pollution Control (BPC) and the United States Environmental Protection Agency (EPA). These samples were taken from lots along Hampton Court, approximately one-half mile northwest of the Mayfair subdivision. Dr. Pike reviewed these samples and stated in an affidavit that it was more probable than not that the chemicals found in the Hampton Court area were produced by the tire manufacturing industry in Natchez Mississippi and that it was more probable than not that some of the chemicals were hazardous and/or toxic materials. (Vol. III, p. 569).

Dr. Pike admitted that he did not know where Mayfair was, whether any testing had been done there, or where plaintiffs lived. (Vol. III., p. 632-33). It is undisputed that he relied on data from tests he did not do, of soil taken from property not involved in this case. It is also undisputed that based on these same tests, the BPC concluded that there was no imminent threat to the public health or the environment and that no type of emergency response action was warranted. (Vol. IV, p. 1135).

Dr. Pike also reviewed tests by the Mississippi Office of Pollution Control(OPC), the successor to the BPC, in the Hampton Court, George F. West Boulevard, and Mayfair areas. Soil vapor samples taken at two lots in Mayfair, neither of which belonged to plaintiffs, indicated the presence of trace amounts of hydrogen sulfide. (Vol. IV, pp. 116-17). One sample taken from a lot located a quarter mile northwest of Mayfair showed a hydrogen sulfide concentration over 200 times greater than that found in Mayfair. The OPC found that this was due to a gas pipeline leak and the presence of sewer and store drains. (Vol. IV, p.1141). The OPC concluded that the site does not pose any significant risk to the public health or the environment. (Vol. IV, p. 1143). Dr. Pike stated by affidavit that the hydrogen sulfide could be a by-product of the tire manufacturing waste stream. (Vol. IV, p. 1123). He did not, however, dispute the OPC's conclusion that no threat to health or the environment was present in the area.

Plaintiffs also relied on the expert testimony of Wilma A. Subra, a chemist, who concluded that it was more probable than not that hazardous components of Armstrong's waste stream were deposited in the land fills on which plaintiffs' homes were built. (Vol. III, p. 810-12). Like Dr. Pike, Ms. Subra did not conduct any chemical analyses of soil samples from plaintiffs' home sites. Unlike Dr. Pike, she did not even base her conclusions on any chemical analysis or testing performed by a third party. (Vol. III, p. 653-54). In-

stead, she relied solely on physical observations of waste at a site unrelated to this case, with no chemical analysis of the waste to determine whether it was toxic. Id.

Beyond the opinions of their experts, there is little in the summary judgment record to evidence the presence of hazardous wastes on plaintiffs' land. Plaintiff James Berry stated in his deposition that he saw rubber and stuff dug up from his back yard. (Vol. III, p. 607) Plaintiffs point to the testimony of various witnesses that they either participated in or saw Armstrong dumping tires and barrels in the general area of plaintiffs' homes some 30 to 40 years earlier. Based on such evidence, plaintiffs and their experts surmise that wherever Armstrong disposed of tires, it probably also disposed of toxic chemicals. Because tires and barrels were removed from James Berry's lot, plaintiffs asked the district court to infer that chemicals from the Armstrong plant were also present on plaintiffs' lots. (Vol. III, pp. 810-12).

The plaintiffs' property damage claim was based on the testimony of William Douglas Upchurch, a real estate expert. He stated that in the Natchez real estate market, the plaintiffs' properties were perceived to be contaminated by toxic wastes, and concluded that a negative market stigma significantly reduced the market values of plaintiffs' properties. (Vol. III, p. 661-69). However, this testimony provided no evidence that toxic or hazardous wastes were present on plaintiffs' property.

4. Cooper

The Cooper plaintiffs Wesley Cooper, his wife, Margaret Cooper, and his mother, Estelle Cooper, live on property located two-thirds of a mile south-southeast from a waste disposal site that Armstrong used from 1939 to the early 1970s. This site, known as the Cain site is separated from the Cooper property by another tract of land. Plaintiffs Warren Benson and his wife, Leslie Mae Benson, live

on property across a public road from the Coopers.

Wesley Cooper claims that hazardous materials from the Cain site have contaminated his private well water and resulted in his stomach cancer. He also claims damages from a reduction in the value of his property. The Bensons do not own the property on which they live, but claim they have suffered personal injury due to exposure to the Cain site.

Plaintiff James Carter lives on and owns property known as the Carter site. This is next to the Batieste site where Armstrong sought and paid for permission to dump wastes. Carter acknowledges that he gave Armstrong permission to dump tires on his property, for which Armstrong paid. However, Carter claims that Armstrong also dumped barrels containing toxic chemicals without his knowledge, and that this dumping reduced the value of his land.

The summary judgment record contains the results of numerous tests performed by state and federal agencies. These tests found no evidence that the Cain, Batieste, and Carter sites contaminated the adjacent properties, property owned by plaintiffs. The investigation of the Cain site began on November 6, 1986. Following initial testing, the United States EPA Region Four Technical Assistance Team (TAT) took samples at the Cain and Carter sites. On July 11, 1987, an EPA representative advised the State Bureau of Pollution Control that the sampling indicated no contaminants that approach a level of concern. The U.S. Agency for Toxic Substances and Disease Registry analyzed the same data and concluded that the ground water posed no public health threat.

On October 17, 1988, the chief of the Hazardous Waste Division of the BPC stated as follows:

As indicated by the ongoing investigation and the outstanding orders, the BPC is of the opinion that the Armstrong sites warrant further investigation, but the data collected and analyzed to date indicates that there is no imminent

threat to human health at these sites (Vol. 1, R. 0045).

On July 20, 1989, a representative of the Hazardous Waste Division of Mississippi Department of Environmental Quality (DEQ), wrote to each private well owner in the area advising that the water was safe to drink and that the chemicals identified in water were naturally occurring and within normal levels. Studies of the Cain site continued. (Vol. 1, R. 38-346; Vol. 7, R. 2509-2530). As of November 3, 1990, the Fidelity Tire Company, which purchased the Armstrong plant in 1987, had installed eight monitoring wells at these sites, taken over fifteen soil samples, over fifty soil borings, and over forty groundwater samples, at a cost of $ 520,000. (Vol. 7, R. 2506-2531; Vol. 1, R. 38-346).

Plaintiffs produced no direct evidence that Armstrong dumped any wastes on the Cooper or Benson land. Their only basis for alleging that hazardous chemicals were present on their land was that chemicals were dumped in other sites, travelled into the groundwater, and contaminated plaintiffs' soil and well water (Vol. VI, p. 2189). Plaintiffs' expert, Dr. Nolan Aughenbaugh, a professor of geotechnical engineering, stated that certain unusual geologic conditions could exist which could allow the migration of toxic chemicals to plaintiffs' land. His conclusion was not based on any studies done on plaintiffs' land.

The district court found that Dr. Aughenbaugh's testimony was in the area of geochemistry or hydrogeology, which require the use of models to determine the movement of water-borne substances. (Vol. X, p. 4139-4140). Dr. Aughenbaugh had no expertise or credentials in that area and admitted that he did not know how to use such models. (Vol. 6, p. 2309). The district court noted that the experts from the state and federal agencies who did perform tests concluded that the groundwater under the Armstrong dumpsites flowed northwest, toward the Mississippi River and away from plaintiffs' land. (Vol. X, p. 4143-44). The district court rejected Dr. Aughenbaugh's contrary speculations

under Rule 703, holding them insufficient to create a genuine issue of fact (Vol. X, p.4140).

Dr. Aughenbaugh's testimony provided the only basis for Dr. William George, a toxicologist, and Dr. Lawrence Miller, a medical doctor, to form their opinions. They testified that a causal relationship could exist between exposure to well water and Wesley Cooper's cancer. However, Dr. George agreed with defendant's experts that the chemicals found in Wesley Cooper's well were at such low levels that they posed no health threat. (Vol. 6, R. 2377-80).

Ms. Subra offered the same opinion as she offered in Berry,with the same lack of analysis that the district court found disqualifying in Berry. William Upchurch also offered his expert opinion as a real estate appraiser on the effect of the perception that toxic substances were present on the Cooper and Carter properties.

5. Admissibility of Expert Testimony

In both Berry and Cooper, plaintiffs attempted to use expert testimony to raise an inference that contaminating wastes were present on the plaintiffs' properties. The district court rejected the expert opinions under Rule 703. (Vol. IV p. 1163; A.R.E. 4). This court finds that the district court's evidentiary rulings were not manifestly erroneous. As this court noted in *Christophersen v. Allied Chemical Corp.*, 939 F.2d 1106, 1110 (5th Cir.1991) (en banc):

The Federal Rules of Evidence, combined with Frye v. United States, 293 F. 1013 (D.C.Cir.1923), provide a framework for trial judges struggling with proffered expert testimony. The signals are not neatly cabined categories, and we disentangle them only to accent the independent significance of each.

(1) Whether the witness is qualified to express an expert opinion, Fed.R.Evid.702;

(2) whether the facts upon which the expert relies are the same type as are relied upon by other experts in the field, Fed.R.Evid. 703;
(3) whether in reaching his conclusion the expert used a well-founded methodology, Frye; and
(4) assuming the expert's testimony has passed Rules 702 and 703, and the Frye test, whether under Fed.R.Evid. 403 the testimony's potential for unfair prejudice substantially out weighs its probative value. 939 F.2d at 1110.

Plaintiffs offered the deposition and/or affidavit testimony of five expert witnesses: Dr. Ralph Pike, a chemical engineer; Dr. William George, a toxicologist; Dr. Lawrence Miller, a medical doctor; Dr. Nolan Aughenbaugh, a professor of geotechnical engineering; Wilma Subra, an analytical chemist; and William Upchurch, a real estate appraiser. Armstrong did not challenge the Rule 702 qualifications of these expert witnesses to testify in their specified areas of expertise. Armstrong argued that Dr. Aughenbaugh, Dr. George, and Ms. Subra stepped outside of their areas of expertise. Armstrong also argued that all these experts relied upon improper facts of a sort not relied upon by experts in their field and failed to use an accepted methodology, in violation of Rule 703 and Frye.

The court correctly noted that Dr. Pike's opinions were not based on tests he performed, or even tests of the properties at issue. Ms. Subra's conclusions were not based on her own expert area of chemical analysis, and were not based on tests of the plaintiffs' properties. Dr. Aughenbaugh testified as a geochemist or hydrogeologist, areas in which he was not qualified, using data and methodology not recognized by experts in those fields. Dr. George and Dr. Miller relied on the work by these experts to form their opinions as to medical causation. Dr. Miller also reached conclusions that the district court found to be unsupported by accepted

methodology. The district court did not commit manifest error in ruling that these experts' opinions were insufficient to overcome summary judgment. See Brock v. Merrell Dow Pharmaceuticals, Inc., 874 F.2d 307, 312-13 (5th Cir.1989), cert. denied 494 U.S. 1046, 110 S. Ct. 1511, 108 L. Ed. 2d 646 (1990).

6. Personal Injury Claims

Only one plaintiff, Wesley Cooper, alleged that he had a specific physical problem resulting from drinking well water polluted from Armstrong dump sites.[2]

The summary judgment evidence failed to show harmful levels of any toxic or hazardous substance in the well water. Plaintiffs presented no evidence beyond conclusory allegations that Armstrong caused dangerous levels of any chemical or substance in plaintiffs' groundwater.

Plaintiffs' own expert, Dr. George, acknowledged that exposure to chemicals at the levels found in the Cooper well were too low to cause cancer. (Vol. X, p. 4138). Dr. Miller, plaintiffs' expert physician, agreed that the chemicals found would have to be present in much higher levels to cause stomach cancer. We affirm the district court's ruling that Dr. Aughenbaugh's conclusions are insufficient to create a fact issue as to the presence of toxins on plaintiffs' land. Viterbo, 826 F.2d at 422. Dr. George and Dr. Miller's conclusions depended on Dr. Aughenbaugh's testimony. The medical experts also found an inadequate level of chemicals in Cooper's well to cause his cancer and is similarly insufficient to create a fact issue.

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[2] Only the Cooper plaintiffs appeal the district court's grant of summary judgment as to their personal injury claims. The Berry claimants do not appeal on this issue. (Appellant's Reply Brief at 1).

Dr. Miller stated that the chemicals would have to be significantly above the background levels revealed in the soil and water testing to cause cancer. (Vol. 6, R. 2390). Dr. George offered similar testimony. (Vol. 6, R. 2377-80). We affirm the district court's grant of summary judgment.

7. CERCLA

A plaintiff must show four elements to establish a claim for relief under CERCLA; 42 U.S.C. @ 9601-9675:

1. the site in question is a facility;
2. the defendant is a responsible person;
3. a release or threatened release of a hazardous sub stance occurred; and
4. the release or threatened release has caused the plaintiff to incur response costs. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir.1989).

The district court dismissed the plaintiffs' CERCLA claims because, despite almost two years of discovery, plaintiffs failed sufficiently to prove the presence of any hazardous substances on their property to withstand summary judgment. A site cannot be a facility unless a hazardous substance has been deposited stored disposed of or placed or otherwise came to be located. . . at the site. Amoco, 889 F.2d at 668, n. 4. As a matter of law, plaintiffs cannot meet the first requirement of a CERCLA claim. In both Berry and Cooper, plaintiffs failed to provide evidence of tests performed on plaintiffs' properties that showed particularized findings that hazardous or toxic substances were present. The district court's summary judgment dismissing plaintiffs' CERCLA claim is therefore affirmed.

8. Mississippi Trespass and Nuisance Claims

Plaintiffs point to Phillips v. Davis Timber Co., Inc., 468 So.2d 72 (Miss.1985), to support their common law nuisance and trespass claims. In that case, the Mississippi Supreme Court held that a plaintiff could state a claim for nuisance even if the levels of toxins found on the land did not reach dangerous levels. However, a plaintiff must present evidence of an invasion by defendant in order to withstand summary judgment. Phillips, 468 So.2d 72, 79. The Cooper and Berry plaintiffs failed to show such evidence of an invasion by Armstrong to withstand summary judgment.

A cause of action for public nuisance is predicated on a showing that the defendant's activities have injured a public right. See Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc., 521 So.2d 857, 860 (Miss.1988). The summary judgment record of testing by many agencies and organizations showed no threat to human health. Plaintiffs presented no evidence of test results showing a level of pollutants on plaintiffs' property that could endanger the public. The summary judgment dismissing the nuisance claim is affirmed.

9. Property Damage

Plaintiffs' expert appraiser, William Upchurch, contended that the stigma attached to plaintiffs' property had significantly reduced its value. The district court concluded that even if this expert testimony was accepted as true, plaintiffs could not recover under Mississippi law for reduced market value caused by a stigma absent some physical damage to plaintiffs' land caused by the defendant.

Plaintiffs point to two Mississippi cases to support the claim that a decrease in market value caused by a stigma is compensable. See *Phillips v. Davis Timber Co.*, 468 So.2d 72, 78 (Miss.1985); *Bynum v. Mandrel Ind., Inc.*, 241 So.2d 629, 633 (Miss.1970). In both these cases, the defendant physically damaged the plaintiff's property. Plaintiffs have

cited no case, and the court has found none, holding that Mississippi common law allows recovery for a decrease in property value caused by a public perception without accompanying physical harm to the property. The district court's dismissal of the state law property claims is affirmed.

CONCLUSION

Despite two years of discovery, plaintiffs failed to provide the district court with sufficient admissible evidence that pollutants were on plaintiffs' land or in their groundwater to establish a genuine issue of material fact. Plaintiffs' conclusory, unsupported allegations are insufficient to avoid summary judgment. The opinion of the district court is **AFFIRMED**.

APPENDIX B

J. WESLEY COOPER, ET AL., *PLAINTIFFS*, VS. ARMSTRONG RUBBER COMPANY, *DEFENDANT.*

CIVIL ACTION NO. J88-0464(B)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

August 13, 1991

MEMORANDUM

Barbour, Chief Judge.

This cause is before the Court on the Motion of Defendant Armstrong Rubber Company ("Armstrong") for Partial Summary Judgment and for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Having considered the Motions together with supporting and opposing memoranda and documentation, the Court is of the opinion that the Motion for Partial Summary Judgment should be granted and that the Motion for Summary Judgment should be granted for the reasons as set forth below.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs, J. Wesley Cooper, Estelle Cooper, Margaret Cooper, Carolyn Cooper Guido, James Carter, Warren G. Benson, and Leslie Mae Benson, are citizens of Adams County, Mississippi. These Plaintiffs, and others who were subsequently nonsuited, claimed that the dumping of in-

dustrial wastes by Armstrong on sites known as the Cain, Carter, and Batieste sites and other sites scattered throughout the City of Natchez and Adams County have caused them both personal injury and property damages. Armstrong began dumping wastes from its Natchez, Mississippi, tire plant at the Cain site in rural Adams County at an undetermined time after the plant began operations in 1939 and continued dumping there until the early 1970s. The Carter and Batieste properties are to the northwest of the Cain site. Armstrong dumped at both of these sites in a smaller volume and over a more limited period of time than at the Cain site.

In their original Complaint, Plaintiffs asserted a number of environmental claims as well as common law claims. Armstrong filed a Motion to Dismiss and first Motion for Summary Judgment. The Court, by Order dated February 1, 1989, dismissed claims under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq.; Clean Water Act, 33 U.S.C. § 125 et seq.; Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 136S(a); Clean Air Act, 42 U.S.C. § 7401 et seq.; Safe Drinking Water Act, 42 U.S.C. § 300f et seq.; Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; Solid Waste Disposal Act, 42 U.S.C. § 6901 et seq.; Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 et seq. ("RCRA"), and federal common law nuisance claims. After the ruling on the first Motion for Summary Judgment, the only claims remaining were the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") citizen suit claim for response costs pursuant to Section 9607(a)(iv)(b) and a claim for nuisance under Mississippi common law. Subsequent to this ruling, Plaintiffs have amended their Complaint twice, resulting in the following claims being asserted: (1) the CERCLA claim; (2) nuisance; (3) a claim for strict liability asserting ultrahazardous activity; (4) trespass; (5) non-natural use of land; and (6) negligence.

This suit was filed on September 6, 1988. After the first summary judgment opinion was issued, the Court held a status conference on February 6, 1990, which resulted in a scheduling order which allowed all parties to complete discovery. Discovery has been completed. On November 5, 1990, Defendant filed its second Motion for Summary Judgment and Motion for Partial Summary Judgment. Defendant presents a number of arguments in support of its claims.

II . ANALYSIS

A . STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure states in relevant part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Moreover, the party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact. Id. at 323.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. The district court, therefore, must not "resolve factual disputes by weighing conflicting evidence, . . .

since it is the province of the jury to assess the probative value of the evidence.n *Kennett Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980). The Fifth Circuit has stated the standard as follows:

> [Rule] 56(c) mandates summary judgment in any case where a party fails to establish the existence of an element essential to his case and on which he bears the burden of proof. A complete failure of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact. Rule 56(c) requires the district court to enter summary judgment if the evidence favoring the nonmoving party is not sufficient for the jury to enter a verdict in his favor. When the moving party has carried his burden under Rule 56(c), his opponent must present more than a metaphysical doubt about the material facts.

Washington v. Armstrong World Industries, Inc., 839 F.2d 1121, 1122-23 (5th Cir. 1988) (citations omitted). Summary judgment is improper when the court believes it unlikely that the opposing party will prevail at trial. *National Screen Service Poster Exchange. Inc.,* 305 F.2d 647, 651 (5th Cir. 1962).

The summary judgment motion permits adjudication without prolonging the action with a time-consuming and expensive trial where there is no genuine issue of material fact. Rule 56(e) states in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that

there is a genuine issue for trial.

Rule 56(e) does not permit mere conclusory allegations that a factual dispute exists to defeat an otherwise properly supported motion for summary judgment. "Courts are particularly indisposed to allowing conclusory allegations to defeat summary judgment after there has been—as here—opportunity for discovery. " *In re Agent Orange Product Liability Litiaation*, 611 F. Supp. 1223, 1258 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

B . MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant filed its Motion for Partial Summary Judgment on the claims of Plaintiffs J. Wesley Cooper, Margaret Cooper, Estelle Cooper, Carolyn Cooper Guido, James Carter, Warren G. Benson, and Leslie Mae Benson arising out of 59 of 64 sites identified by Wesley Cooper seeking dismissal of all claims relating to these sites. On May 23, 1989, Plaintiffs filed a Motion for Class Certification, seeking certification of a class comprised of all persons who have owned land near dump sites on which Defendant allegedly dumped hazardous wastes. The Court denied the class certification motion as well as a related consolidation claim. The case has proceeded on the individual claims of the named Plaintiffs. Counsel for Plaintiffs sought to add an additional thirty or forty parties, but the Court denied the proposed amendment by Order entered April 3, 1990. Defendant argues that by pursuing claims relating to sites scattered throughout Adams County Plain class certification.

During the course of discovery, which ended on October 5, 1990, Plaintiff Wesley Cooper identified 64 sites in Natchez and Adams County which he contends were contaminated by Defendant. The instant Motion for Partial Summary Judgment seeks dismissal of all claims arising out of 59 of these 64 sites which are not adjacent to or near Plaintiffs' residences and which have not been shown to have

caused injury to Plaintiffs or their properties. Excluded from this Motion are claims based on the Cain and Batieste sites which are in the same area where the three Cooper Plaintiffs live and the Carter site located on Plaintiff Carter's farm. These he subject of the separate (second) Motion for Summary Judgment. The 64 sites are identified in Addendum 1 by numbers 1 through 64 which correspond to the site-identifying numbers placed on the City of Natchez Map and the general Highway Map, Adams County. SEE Exhibit 1 and Exhibit 2 to the deposition of Wesley Cooper.[1]

Defendant contends that Plaintiffs have produced no evidence that hazardous substances are present at any of the sites and that Plaintiffs have produced no evidence that Plaintiffs or their properties have been injured or damaged as the result of anything emanating from these sites.

Defendant notes that, after more than two years of discovery, none of the Plaintiffs has tested or investigated the soil, water, or air at any of the 59 sites. Plaintiffs' Reply Brief refers the Court to the record which they say establishes conclusively that Defendant's waste stream "contains toxic, hazardous and carcinogenic compounds along with other plant waste such as reject tires, scrap rubber, burnt rubber, etc." In support of this argument, Plaintiffs filed an unsworn and unsigned document which purports to be the affidavit of their expert, Wilma Subra. Subra concludes, without identifying any of the 59 sites which are the subject of the Motion for Partial Summary Judgment, that massive quantities of hazardous and toxic substances were placed at the Cain, Carter, and Batieste sites and that since rem

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[1] The 59 specific sites which are the subject of this Motion are sites: 1, 2, 3, 4, 5, 6, 7, 8, 9, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 44A, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, and 74. The Sadie V. Thompson School property was identified by Plaintiffs as site number 74, probably an error since numerically it is the 64th site. Excluded from this Motion are sites 10 (Cain), 11, 12, 13 (Batieste), and 14 (Carter).

nants of the tire waste stream (scrap rubber and tires) have been found these products-should be viewed as markers. Subra concludes that "this leads to the obvious conclusion that where there are remnants of the tire plant waste stream which is reject tire and rubber wastes in order to protect the environment and public health it must be assumed that there has also been a release of hazardous materials at the other sites identified by Mr. Cooper." She does not draw her conclusions from any test data but relies on an inference that remnants of a waste stream are reliable indicia of a release of hazardous materials. Having no factual basis for her conclusory remarks and having conducted no scientific investigation, her opinion is inadmissible. Expert testimony will not salvage a plaintiff's case from summary judgment unless that testimony would be admissible into evidence. *Viterbo v. Dow Chemical Co.*, 646 F. Supp. 1420, 1424 (E.D. Tex. 1986), *aff'd*, 826 F.2d 420 (5th Cir. 1987); Fed. R. Civ. P. 56(e). Although Federal Rule of Evidence 703 broadens the acceptable bases of expert opinion, "this does not extend to 'make summary judgment impossible whenever produced an expert to support its position." Viterbo, 826 F.2d at 422 (quoting *Merit Motors. Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977)). Conclusory opinions by qualified experts are insufficient to defeat a motion for summary judgment.

Even if any of the materials at the site had been tested and determined to be hazardous, Plaintiffs have not offered any proof that their properties have been harmed or that they have sustained personal injuries by the eondition at these sites. Plaintiffs have raised no genuine issues of material fact. The Court, therefore, grants the Motion of Defendant for Partial Summary Judgment on the elaims for nuisanee, trespass, negligenee, non-natural use of land, and ultrahazardous activity conneeted with all of the 59 sites.

Defendant asserts that Plaintiffs have failed to raise genuine issues of material fact concerning a "release or

threatened release of hazardous substances" on any of the 59 sites. Plaintiffs seek to recover "response costs" under CERCLA for cleaning up the environment. They contend that there have been releases of hazardous substances into the environment and that they have sustained response costs. Before Plaintiffs can recover for such costs, they are required to show that there has been a "release or a threatened release of hazardous substances" as defined in the CERCLA statute. 42 U.S.C. § 9601 *et seq. See Prudential Insurance Co. of America v. United States Gypsum*, 711 F. Supp. 1244, 1251 (D.N.J. 1989); *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1281 (D. Del. 1987).

Under CERCLA a "release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . ." 42 U.S.C. § 9601(22). A "hazardous substance" is defined under CERCLA in technical terms:

> (A) Any substance designated pursuant to § 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substanee designated pursuant to § 9602 of this title, (C) any hazardous waste having the characteristic~ identified under or listed pursuant to § 3001 of the Solid Waste Disposal Act [42 U.S.C.A. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 9601 et seq.] has been suspended by act of Congress), (D) any toxic pollutant listed under § 1317(a) of Title 33, (E) any hazardous air pollutant listed under § 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any eminently hazardous chemical substance or mixture with respect to which the administrator has taken action pursuant to § 2606 of Title 15.

42 U.S.C. § 9601(14). In other words, Plaintiffs cannot simply point to tires, rubber scraps, and drums and establish a release or threatened release of hazardous substances. As to these 59 sites, the record is silent as to the

release of hazardous substances into the environment. Plaintiffs have failed to present proof that listed substances, or substances which are recognized by statute or regulation as being hazardous, are actually present at one or more of the 59 sites in quantities which exceed regulatory standards. Accordingly, partial summary judgment on all CERCLA claims arising out of these 59 sites will be granted.

The Court notes that in response to the Motion for Partial Summary Judgment Plaintiffs urge that "defendant has come forward with no evidence to support its position pursuant to Rule 56 of the Federal Rules of Civil Procedure." On the contrary, Defendant filed an Appendix with its Motion that establishes Plaintiffs have not cited any specific hazardous substances at the 59 sites, they have not been harmed by any condition at the sites, and their property has not been adversely affected. Plaintiffs' evidence in support of their CERCLA claim is predicated on Subra's conclusory assertions. The Court has determined that Subra's affidavit is inadmissible. However, even were it admissible, her opinion, based upon a series of inferences, does not create a fact issue on whether any release of a hazardous substance has occurred at any of the 59 sites. And in a CERCLA case a plaintiff is required to establish a release of a hazardous substance at the site involved. In the instant case Plaintiffs have failed to present admissible evidence raising a material dispute as to that issue.

The United States Supreme Court has stated that a nonmoving party which bears the burden of proof at issue "must [when a summary judgment motion is filed] go beyond the pleadings and by her own affidavits . . . designate specific facts showing that there is a genuine issue for trial." Id. at 274. Plaintiffs have not established by affidavit or otherwise that there has been a release or a threatened release of a hazardous substance onto any of the 59 sites. Accordingly, the Court determines that there is no genuine issue of material fact and that the CERCLA claims arising out of the

59 sites should be dismissed.

The Court concludes that Defendant Armstrong is entitled to summary judgment as to all claims under CERCLA, nuisance negligence, non-natural use of land, and ultrahazardous activity which arise out of the 59 sites.

C. MOTION FOR SUMMARY JUDGMENT

Defendant contends that Plaintiffs have produced insufficient evidence and can prove neither damages nor a causal link between Armstrong's disposal practices and Plaintiffs' claimed damages on the properties owned by Plaintiffs (sites 10, 11, 12, 13, and 14). Defendant argues that Plaintiffs have not offered admissible evidence to support their allegation that there is a causal link between actions of Defendant and any alleged personal injury or property damage of Plaintiffs. After two years of discovery, Defendant argues, Plaintiffs have at best raised a "metaphysical doubt" as to the existence of actual damages and are incapable of establishing the essential causal link.

Defendant asserts that all personal injury claims should be dismissed. James Carter does not assert a personal injury claim. Mr. and Mrs. Benson claim that they have suffered personal injury from exposure due to their proximity to the Cain site. Neither, however, have produced any evidence at all in support of their personal injury claims. There is no medical nor toxicological or other expert evidence to link the Bensons' various physical complaints to the dumping practices of Armstrong. Wesley Cooper claims that drinking the well water allegedly contaminated with arsenic, cadmium, chromium, and nickel over a period of years caused him to have stomach cancer. Neither Cooper's wife, mother, nor daughter have produced any evidence concerning personal injury claims. Neither Plaintiffs' toxicologist, Dr. William George, nor their internist, Dr. Larry Miller, has examined any medical evidence or records other than those of Mr. Cooper. They have, therefore, rendered

no opinions on any medical claims other than those of Mr. Cooper. In order to survive summary Judgment on his personal-injury claim, Wesley Cooper must present sufficient proof of eausation. In response Plaintiffs argue that all Plaintiffs should be entitled to recover for emotional distress, but Plaintiffs do not attempt to refute their admissions that, with the exception of Wesley Cooper, they have no mediecal, toxieological, or other expert evidenee to link their various physical complaints to Armstrong's waste disposal at the subjeet sites. Plaintiffs' brief argues that Wesley Cooper's stomach cancer was caused by his drinking his well water which was contaminated by chemicals from the Cain site. In support of this argument, they rely on the deposition testimony of Dr. George and the affidavit of Dr. Miller. Both Drs. George and Niller recognize that for the chemicals at issue to have caused Cooper's caneer his drinking water had to have concentrations above background levels of the chemicals in question.

Defendant cites the affidavit of their expert toxicologist, Dr. Raymond D. Harbison, and medical doctor, Harris Busch, as stating the basic steps a scientist must go through to determine the cause of cancer. These include the following:

(1) that the chemical in question is capable of producing the disease in question in hu mans;
(2) that the individual was exposed to the chemical in question;
(3) that the exposure resulted in a dose;
(4) that the dose was of sufficient magnitude to have caused the disease (dose-response);
(5) for chronic effects, that the exposure was of sufficient duration to have caused the dis ease;
(6) that alternative confounding or contributing

> factors to the disease have been considered and eliminated; and
> (7) that the alleged effect is biologically plausible.

Assuming all of these factors have been evaluated and answered affirmatively, in order to attribute the chemical exposure to a specific source, the following additional step must be considered:

> that alternate sources of exposure to the chemical have been considered and eliminated.

The most salient item in the checklist is that the person who has a disease must have been exposed to the chemical which is accused of causing the disease in a high enough level and for a sufficient duration to have caused the disease. In order to defeat this motion for summary judgment on the personal injury claims, Wesley Cooper must present evidence that the dose he received, i.e., the concentrations of chemicals from his well water that he drank, were sufficient to cause cancer. Drs. Busch and Harbison in their affidavit explain that the necessary dose-response relationship cannot be proven as to the subject chemicals. In the majority of analyses conducted on Mr. Cooper's well water, arsenic, cadmium, chromium, and nickel were not detected in the water. Moreover, due to their natural occurrence in the environment the general populace is regularly exposed to the chemicals arsenic, cadmium, chromium, and nickel everyday. Both Defendant and Plaintiffs' experts agree that proof of the dose-response relationship is essential for causation. The maximum exposures that Mr. Cooper may have received from his drinking water, does not exceed background levels that we all are faced with every day.

Dr. Miller, Mr. Cooper's medical expert, agreed that in order for the chemicals to cause cancer the exposure would have to be above background levels—"in fact, sig-

nificantly above those levels." At the end of his deposition, Dr. George, Plaintiffs' toxicologist who had previously speculated that combinations of the chemicals in question at sufficient concentrations could cause cancer, acknowledged that the exposure from the low levels of these chemicals found in Cooper's well water was not adequate to cause his cancer:

> Q: And at these levels of concentration, you question whether or not his drinking, that water would have caused his cancer?
>
> A: . . . in answer to your question, presently at those lower concentrations I don't think that I could make the statement that those con centrations had caused that effect.

Dr. Miller does not state that exposure to the low levels of chemicals found in Mr. Cooper's well will cause cancer. Dr. Miller's affidavit is deficient since he cites no references to accepted medical studies to support his opinion that the chemicals in question cause stomach cancer, nor does he cite any epidemiological study to support his position. *Brock v. Merrell Dow Pharmaceuticals. Inc.*, 874 F.2d 307, 312-13 (5th Cir. 1989), *cert. denied*, llO S. Ct. 1511 (1990) (lack of epidemiologic proof of a link between exposure to bendectin and birth defects was fatal to plaintiffs' case); *Washington v. Armstrong World Industries. Inc.*, 839 F.2d 1121, 1123 (5th Cir. 1988) (expert's causation opinion was excluded for summary judgment purposes since the expert's affidavit revealed no evidence of causation that he could produce at trial). Dr. Miller now bases his opinion on the assumption that Cooper's water was contaminated by high levels of chemicals from 1950 through the 1970s. He relies on the affidavit of Dr. Nolan Aughenbaugh, Plaintiffs' geotechnical engineer, to establish his opinion.

The Court notes that Dr. Aughenbaugh cannot establish a proper foundation for his opinions and the Court thus rejects his testimony. As of the date of his deposition, Aughenbaugh had not been to the sites nor had he ever worked on a geological study in Adams County. The sole basis for his opinion was his review of the Malcolm Pirnie studies, which after only a few hours of study and no independent research in the field or review of the field data he rejected. Without providing any facts or data or accepted scientific methodology, he offers unqualified conclusions. His opinions have no basis in fact or data and, therefore, must be rejected. Rule 703 of the Federal Rules of Evidence.

Aughenbaugh is in the same position as the plaintiffs' expert in Washington. His geological opinions are not linked to the actual facts at the Cain, Carter, and Batieste sites. He simply speculates, based primarily on experience with sites in Illinois, that certain exceptional geological conditions could exist and, if they did, they could cause Malcolm Pirnie's conclusions to be in error. Speculation followed by speculation, unlinked to the case specific facts, should be rejected. Malcolm Pirnie, who conducted extensive studies in the field, is in the role of the examining physicians in Washinaton. Aughenbaugh is in the role of the nonexamining physician who speculates and draws negative inferences. 839 F.2d at 1123-24. His testimony is, accordingly, rejected.

Furthermore, Plaintiffs' experts have failed to rule out alternate causes of stomach cancer. This omission is significant because stomach cancer occurs regularly in the general population. Cigarette smoking is a factor generally associated with stomach cancer and Mr. Cooper has over a forty-year continuing smoking history.

The Fifth Circuit requires proof from the plaintiff that the plaintiff was exposed to the accused substance in an amount and of such a duration to have caused the alleged injury. In *Osburn v. Anchor Laboratories. Inc.*, 825 F.2d 908,

910 (5th Cir. 1987), *cert. denied*, 485 U.S. 1009 (1988), it was undisputed that the plaintiff had used chloramphenicol to treat cattle and had spilled the drug on his hands during treatment, providing the requisite exposure. In *Thompson v. Southern Pacific TransDortation Co.*, 809 F.2d 1167 (Sth Cir.), *cert. denied*, 484 U.S. 819 (1987), plaintiff's expert, a chemical engineer, testified how the plaintiff could have been exposed to dioxin through ingestion, inhalation, absorption into the body. However, the engineer and plaintiff's toxicologist were unable to testify as to the amount and duration of the plaintiff's actual exposure:

> The engineer did not testify, however, about Thompson's degree of exposure to dioxin; he did not know where Thomp~on worked at Luling or the amount of time Thompson spent at the plant site. In short, his testimony simply indicated that someone working around dioxin-contaminated soil might develop porphyria and described how that possibility could be established without specifically addressing Thompson's exposure.
>
> A second expert, a toxicologist, did testify that dioxin caused Thompson's porphyria. He based his opinion on the fact that Thompson worked at a site where dioxin was found and therefore "definitely could have come into contact with it." He did not, however, have any knowledge about the amount or duration of Thompson's exposure. There was, then, an insufficient factual basis for his opinion.

Id. at 1169 (emphasis added). Accordingly, the Fifth Circuit reversed the district court and granted the defendant's motion for judgment notwithstanding the verdict. Id.

In the instant case Wesley Cooper's personal injury claims and the personal injury claims of the other Plain-

tiffs must fail because they have failed to create a genuine issue of material fact. Plaintiffs have failed to produce evidence of a causal link sufficient to withstand summary judgment on the strict liability and negligence claims. See *Early-Gary. Inc. v. Walters*, 294 So. 2d 181, 186 (Miss. 1974) (under Mississippi law, in strict liability and negligence cases, plaintiff has burden to prove injury was caused by acts or omissions of defendant). Without some proof to support the element of causation, the strict liability and negligence-claims must fail. Accordingly, the Motion for Summary Judgment as to all claims for personal injury is granted.

Defendant asserts that all property damage claims should be dismissed. In their response Plaintiffs "voluntarily dismiss" the property damage claims of Warren G. Benson, Leslie Mae Benson, Estelle Cooper, and Carolyn Guido. Thus, the only claims before the Court are those of Wesley Cooper and Margaret Cooper and Tom Carter.

William Upchurch, Plaintiffs' real estate expert, surmises that based on the assumptions that the ground water is polluted and that a stigma is attached to the Cooper property the property is worth only 28% to 33% of its normally appraised value. Upchurch states that, absent water pollution and the stigma, the property would be worth its full appraised value and continue to appreciate. As discussed above, Plaintiffs rely on Aughenbaugh's affidavit to support their assertion that the chemicals which allegedly contaminate Cooper's well came from the Cain site. The Court has determined that Aughenbaugh's affidavit fails to create a genuine issue of material fact.

For four years the United States Environmental Protection Agency ("EPA"), the Mississippi Bureau of Pollution Control ("MBPC"), and, pursuant to MBPC orders and supervision, Malcolm Pirnie Engineers, Inc., a national environmental consulting firm employed by Armstrong, have been studying the Cain, Carter, and Batieste sites to deter-

mine if they present a risk to human health.[2] A-basic fact emanating from the study is that the Natchez aquifer, which lies approximately 150 feet below the surface and from which the local residents, including Mr. Cooper, pump their private well water, flows in a west-northwest direction.

Any contaminants that make their way through the 150 feet of soil to the Natchez aquifer below the Cain site would flow to the west, away from Mr. Cooper's house, toward the Mississippi River. The observed flow in the eight monitoring wells drilled at the Cain and Batieste sites confirm this west-northwest flow direction. The logs for these eight wells, made by the geologist in the field who studied and charted the soil as the wells were being drilled, establish that the reason the aquifer flows to the west-northwest is because that is the downhill direction. These eight wells show that as you go west from Monitoring Well 5, located to the east of the Cain site, to Monitoring Well 4A and on to the three wells at the Batieste site, the aquifer continually drops in elevation. While underground aquifers flow through rocks and sands and are different in certain respects from surface streams, they do flow downhill just like sur face water.

Aughenbaugh speculates that the Natchez aquifer is polluted. These speculations are refuted by the Malcolm Pirnie'sstudies; defendant's hydrogeologist, Dr. Robert Sterrett's Affidavit; the Affidavit of Sam Mabry, the Chief of the hazardous Waste Division of the BPC; and the action of the MBPC, which in letters from Trey Fleming to local residents advised that their water was safe to drink.

---

[2] This has been an exhaustive study costing over $520,000. Both the EP A and MBPC have collected their own samples and made independent analyses of the field data. Malcolm Pirnie Engineers, Inc. has drilled water wells, taken surface samples, made borings, and taken water samples pursuant to the professional protocol used throughout the country for envir onmental site studies.

Aughenbaugh attempts to question whether the natural flow of the aquifer can be reversed and whether such a reversal could be sustained over a period of years so that Cooper's well could be contaminated. Aughenbaugh surmises that either of two phenomena could reverse that flow: (1) Mr. Cooper's well or wells in the area could pump at a sufficient rate to cause a reversal of the flow back to his well; and/or (2) the Mississippi River at high water could cause the water to back up to Cooper's well. The Court observes that this is sheer speculation about the possible, not a study of the data or application of any scientific methodology. Dr. Sterrett, using Malcolm Pirnie field-tested data, refutes the argument that Cooper's well could back up the natural flow sufficiently to effect groundwater under the Cain site and demonstrates that the backup of the Mississippi River at the highest level in the last fifty years would not even cause an impact on water from the Batieste site, the closest site to the river.

Aughenbaugh's response to this is that the mathematical models used for these purposes do not always work. He bases his response on the necessity for the correct data being plugged in order to generate the correct answers. Aughenbaugh's refutation is based on speculation- and generalized assumptions. The United States Supreme Court has recently stated the law regarding conclusory allegations:

> In ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the non-moving party" only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that general averments embrace the "specific facts" needed to sustain the complaint. . . . Rule 56(e) provides that judgment ~shall be entered" against the nonmoving party unless affidavits or

other evidence "set forth specific facts showing that there is a genuine issue for trial.n The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.

It will not do to "presume" the missing facts because without them the affidavits would not establish the injury that they generally allege. That converts the operation of Rule 56 to a circular promenade: plaintiff's complaint makes general allegations of injury; defendant contests through Rule 56 existence of specific facts to support injury; plaintiff responds with affidavit containing general allegation of injury, which must be deemed to constitute averment of requisite specific facts since otherwise allegation of injury would be unsupported (which is precisely what defendant claims it is) .

Lutan v. National Wildlife Federation, 111 L.Ed.2d 695, 716-17 (1990). Plaintiffs predicate their attempt to defeat the Motion for Summary Judgment on conclusory allegations that are unsupported by specific facts. Aughenbaugh's arguments that Malcolm Pirnie's study was flawed is an attempt to obfuscate the fact that there is no factual basis for Wesley Cooper's property damage claim. There is no evidence that Defendant's dumping one-third of a mile, according to Plaintiffs, or two-thirds of a mile, according to Defendant, away from Wesley Cooper's house poses any threat to his house since the only route in which her property could realistically be exposed would be through the groundwater and the groundwater runs away from his property, not towards it. Plaintiff Wesley Cooper has failed to create a genuine issue of material fact on his claim for property damages. Accordingly, the Motion for Summary Judgment is granted on Wesley and Margaret Cooper's prop-

erty damage claims.

James Carter's claim for property damages is premised on the appraisal of his property by Plaintiffs' William Upchurch. Upchurch assumes that waste located on the property is hazardous and that a cleanup of the property sary. Based on these assumption, Upchurch contends that the property would have a negative value due to a necessary cleanup costing hundreds of thousands of dollars. Defendant asserts that Upchurch's assumptions are unfounded in fact and should be disregarded with respect to the Carter property.

Plaintiffs agree that Mr. Carter permitted Armstrong to dump industrial waste on his property. Plaintiffs assert that Armstrong property, but they do not specify what hazardous substance was dumped. Well samples, stream samples, and drum content samples have been taken by MBPC from the Carter property. The Mississippi Department of Environmental Quality has recently given notice that:

> This letter is to inform you that the above referenced site has been referred to the Non-Hazardous Waste Unit of the Office of Pollution Control for further agency oversight and management. Existing site information provides no indication that hazardous substances were managed or disposed on the Carter property.

The Technical Assistance Team of the EPA sampled the Carter site. As a result of the testing, the Superfund branch of the EPA concluded that the sampling revealed no contaminates that "approach a level of concern." Likewise, the Agency for Toxic Substances and Disease Registry concluded that the sample results did "not indicate that a pub-

lic health threat exists from the use and consumption of the area groundwater." The Court thus concludes that Upchurch's assumptions of hazardous waste contamination of the Carter property are not admissible.

The only claim for property damage remaining is whether "devaluation" caused by a stigma attaching to property is compensable if the basis for the stigma is not grounded in fact. Defendant contends that this perceived property value reduction is not a compensable damage to property under Mississippi law.

No Mississippi case has addressed the issue of recovery for reduced market value caused by stigma. Defendant, however, cites *Dennery v. Huahes*, 59 So. 2d 316 (Miss. 1952), as indicating that this would not be a compensable damage under Mississippi law. In *Dennery* the plaintiffs sought to enjoin the establishment of a cemetery in the vicinity of their homes, alleging that the cemetery would cause them to suffer irreparable damage to their property values. The Mississippi Supreme Court held that there is no private nuisance "when the only basis of complaint is that the market and rental value of neighboring residential property is lowered because of the depressing psychological influence which a cemetery exerts." Id. at 318. Plaintiffs' proof of damage is Upchurch's opinion that a stigma has diminished the market value of the property. Plaintiffs point out that Dennery states that a cemetery would be a nuisance if drainage from the cemetery would contaminate the waters of adjoining property owners. As discussed above, Plaintiffs have not produced sufficient proof on the presence of the alleged hazardous wastes on Plaintiffs' properties in order to survive summary judgment on the toxic waste claims. The proof presented on the contamination issue is insufficient.

The cases cited by both Plaintiffs and Defendant lead the Court to the conclusion that the Supreme Court of Mississippi, if presented with this issue, would hold that a mar-

ket stigma is not a compensable damage absent a confirmed physical property damage or a confirmed threat of physical property damage. In the instant case, the appraisal reduction is based on the general beliefs that there are dangerous chemicals in the area causing health problems. However, Plaintiffs have not identified such substances on either Carter's property or the property of Wesley and Margaret Cooper. Accordingly, the property damage claims for strict liability asserting ultrahazardous activities and non-natural use of land are dismissed.

Plaintiffs allege that Defendant is liable for creating a nuisance. Nuisance is one party's unreasonable interference with use and enjoyment of one~s property. The common law of nuisance does not protect a landowner from interference or harm resulting from a previous use of his property by a prior landowner. See *Philadelphia Electric Co. v. Hercules. Inc.*, 762 F.2d 303 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985) (prior owner and producer of wastes not liable to successors in title). Plaintiffs' claims involve a previous use of property, and, furthermore, Armstrong was not a previous owner of the subject properties. Accordingly, the Court grants summary judgment on Plaintiffs' nuisance claims.

Plaintiffs allege "trespassory" invasions of their property. As the Court observed in *Sashfras v. Armstrona Rubber Co.. et al.*, under Mississippi law, "where there is no actual physical invasion of the plaintiff's property, the cause of action is for nuisance rather than trespass." *Blue v. Charles F. Hayes & Associates. Inc.*, 215 So. 2d 426, 429 (Miss. 1968). Migration of substances from the property of one landowner to that of another does not constitute a "physical invasion." *Id.* Furthermore, the transportation of wastes onto Plaintiff Carter's land is not a trespassory invasion because such dumping was performed with Carter's consent. Furthermore, for the reasons as set forth above, Plaintiffs' trespass claims cannot be considered as nuisance claims. Therefore, the Court grants summary judgment on the trespass claims.

Defendant contends that with regard to the CERCLA claim the Court should defer to the primary jurisdiction of the Mississippi Department of Environmental Quality ("DEQ") and its Pollution control agency, the MBPC. The doctrine of primary jurisdiction is "concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States v. Western Pacific Railroad*, 352 U.S. 59, 63 (1956). In the first Memorandum Opinion and Order entered in this case on February 1, 1989, the Court stated, after dismissing most of the federal environmental causes of action, that "judicial resolution of the remaining claims will not unduly interfere with ongoing administrative proceedings." The Court is still of that opinion. Accordingly. the Court will not stay Proceedings in this case as to the CERCLA issues.

Plaintiffs assert that they are entitled to clean up costs and remediation at the sites pursuant to CERCLA. CERCLA only imposes liability where a (1) "hazardous substance" or is threatening release, (3) the hazardous substance is found on the site (4) in a quantity which exceeds some federal or state standard, (5) the hazardous substance found on the site . same type of a substance disposed of by defendant on the site, (5) the presence of the hazardous substance on the site poses an imminent and substantial threat to health or the environment. *Violet v. Picillo*, 648 F. Supp. 1283, 1289 (D.R.I. 1986). If any one of these factors is absent, the entire CERCLA claim must be dismissed, as a matter of law.

Plaintiffs cite as authority for their position *United States v. Hardage*, 733 F. Supp. 1424, 1429 (W.D. Okla. 1989). In that case is was undisputed that hazardous substances had been release into the groundwater at the site and that the hazardous substances had migrated off the site. Defendant contends that those facts are not present herein. Defendant argues that there is no evidence that hazardous substances have contaminated the groundwater or migrated off site. Hardage recognizes that for response costs to be

awarded the plaintiffs must establish that hazardous substances "pose an imminent and substantial threat to the public health and welfare." 733 F. Supp. at 1431. Defendant asserts that no such threat exists at the sites at issue herein.

Plaintiffs offer the affidavit of Dr. Ralph Pike concern for the magnitude of wastes at the Cain site. Wilma Subra argues that insufficient testing has been done and that there needs to be more investigation. Any assertion by Plaintiffs' that more discovery and investigation will reveal facts to support their conclusion will not serve, in and of itself, to defeat a summary judgment motion. The Fifth Circuit has stated on this issue that "[a] claim that further discovery or a trial might reveal facts which the plaintiff is currently unaware of is insufficient to defeat the motion [for summary judgment]." *Washington*, 839 F.2d at 1123 (citing *Woods v. Federal Home Loan Bank Board*, 826 F.2d 1400, 1414-15 (5th Cir. 1987)). Plaintiffs have not identified any hazardous chemicals present at the home sites which present significant risks to health.

Rather than presenting an analysis which they generated, Plaintiffs complain that all actions so far have been by Malcolm Pirnie, which was hired by Defendant. Plaintiffs point out that the priority toxic pollutant list used by Malcolm Pirnie as a listing of analytical parameters for these sites did not include the various tire industry waste of concern. Thus, argues Plaintiffs, the MBPC and Defendant have spent three years looking for compounds at the site which are not representative of the wastes which would be expected from a tire manufacturing plant. Consequently, Plaintiff's experts Pike and Subra both maintain that a large percentage of material at these sites and in the ground water have not been identified. The Court is of the opinion that if Plaintiffs believed that an inadequate investigation has been conducted by Defendant then it was incumbent on Plaintiffs to conduct their on investigation in order to present proof of their claims to this Court.

The results of the investigations are that chemicals at the site do not pose an imminent hazard to human health. Plaintiffs have had ample time and opportunity to develop adequate evidence. Plaintiffs attempt to cover their inability to present admissible proof by arguing that Armstrong's investigation is inadequate. There must be more than a metaphysical doubt as to material facts to defeat a motion for summary judgment. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Without an identification of a hazardous substance on the site, the CERCLA claim must fail. Accordingly, the Motion of Defendant for Summary Judgment is granted as to Plaintiffs' CERCLA claims.

IT IS, THEREFORE, ORDERED that the Motion of Defendant for Summary Judgment is hereby granted as to all claims of Plaintiffs. A separate judgment will be entered in this cause. SO ORDERED this the 13th day of August, 1991.

Signed
William H. Barbour, Jr.
CHIEF JUDGE

No. 93-1048

(2)

Supreme Court, U.S.
FILED
JAN 20 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

J. WESLEY COOPER, MARGARET COOPER and JAMES CARTER,

Petitioners,

vs.

THE ARMSTRONG RUBBER COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Do the Federal Rules of Evidence allow a district court to exclude expert testimony on grounds that the opinion lacked a reliable foundation?

II. In an action to recover response costs, does CERCLA require a plaintiff to present proof that a release or threatened release of a hazardous substance by a defendant caused the plaintiff to incur the costs?

III. Under Mississippi law, is a market stigma a compensable damage absent a confirmed physical property damage or a confirmed threat of physical property damage?

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RESPONDENT'S BRIEF IN OPPOSITION

STATUTES INVOLVED

The following statutes and rules are involved in the present case and set forth in the appendices; 42 U.S.C. §§ 9601(9), 9601(14), 9607(a); Fed. R. Evid. 702, 703.

STATEMENT OF THE CASE

The Respondent, Armstrong Rubber Company ("Armstrong")[1] manufactured tires at its Natchez, Mississippi plant from 1939 until 1987. Until the early 1970s, Armstrong disposed of plant wastes, principally, at a rural location known as the "Cain site." Armstrong's waste stream consisted of reject tires, packing crates, sweepings from the plant floor and other common industrial wastes. (R. Vol. 2, p. 1010). A relatively small portion of Armstrong's waste stream consisted of liquids containing hazardous wastes in trace amounts. These liquids were often burned on site. (R. Vol. 10, p. 4077).

Because of the hilly terrain and highly erodible soil in the Natchez area, landowners requested Armstrong to dispose of its wastes on their properties to assist them in filling and reclaiming gullies and ravines. Petitioner James Carter was one of those landowners. His property, known as the "Carter" site and an adjoining piece of property called the "Batieste" site were disposal sites also at issue in this case. (R. Vol. 2, p. 1002).

The Mississippi Bureau of Pollution Control ("BPC") began its investigation of the Cain site in November 1986. This investigation expanded to the Carter and Batieste sites. Armstrong was ordered to remove drummed wastes from the Batieste site and to conduct testing at all three sites.

Independent testing of the three sites was conducted by the BPC and the United States Environmental Protection Agency ("EPA"). The BPC concluded that, according to the data collected, "there is no imminent threat to human health at these sites." (R. Vol.

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1. Pursuant to Supreme Court Rules 24.1(b) and 29.1, Armstrong states that Armstrong has since sold its assets to Condere Corporation and its stock to Pirelli Enterprises Corporation.

1, p. 0045).[2] The BPC tested the drinking water wells of area landowners, including that of petitioner J. Wesley Cooper ("Cooper"). Chemicals found in the water were within naturally occurring background levels. (R. Vol. 6, P. 2207). The EPA agreed: "In summary, this data review does not indicate that a public health threat exists from the use and consumption of area groundwater." (R. Vol. 1, p. 0051).

During this investigation by Armstrong and the regulators, the petitioners, in September 1988, filed this lawsuit alleging that wastes at the three sites caused them personal injury and property damage. Cooper maintained that his stomach cancer was caused by contamination which reached the groundwater below the disposal sites, flowed to and polluted his well water. The nearest disposal site to the Cooper property is the Cain site, two-thirds of a mile away. The petitioners also sought recovery for "response costs," under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and for property damage under Mississippi common law.

After discovery ended in early 1991, Armstrong filed a motion for summary judgment. By that time, the EPA, BPC and even Cooper's own toxicologist and medical doctor agreed that the extensive testing done at the site established that the groundwater beneath the waste sites flowed away from, instead of toward, Cooper's well. Testing also revealed that the groundwater was not contaminated. The investigations had determined that in order for the waste sites to have a causal connection to Cooper's stomach cancer, (a) the contaminants on the surface of the sites would have to work their way through 100-150 feet of soil and into the

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2. The petitioners mistate that the three sites met "superfund category status." Petition at 4. BPC did not determine that the three sites were "superfund" sites deserving federal funds for a cleanup. BPC only stated that the sites should be studied using superfund standards. (R. Vol. 9, p. 3455).

subsurface groundwater (b) and then the contaminants would have to defy gravity and travel 3500 feet uphill, against the natural water flow, to his private well. (R. Vol. 6, p. 2189). Cooper's defense to summary judgment depended on the opinion of geologist Dr. Nolan Augenbaugh that this aquifer could have reversed direction, sending contaminated groundwater uphill to the Cooper well.[3]

The district court rejected Augenbaugh's testimony as inadmissible because it had no basis in fact; instead, his opinion, that groundwater had reversed direction and that the groundwater was polluted, had no factual support and was based solely on speculation. Likewise, the district court dismissed the petitioners' CERCLA claim finding that "chemicals at the site do not pose an imminent hazard to human health." The petitioners' property damage claims were dismissed because the only "damage" was purported stigma which had allegedly depressed the properties' value. The Fifth Circuit affirmed.

SUMMARY OF THE ARGUMENT

Cooper's personal injury claim is wholly dependent on the expert testimony of Dr. Augenbaugh. Without Dr. Augenbaugh's testimony, the petitioners have no proof that Armstrong's wastes contaminated Cooper's well-water. Cooper was the only plaintiff who pursued a personal injury claim through the summary judgment stage of the case.

The district court properly ruled Dr. Augenbaugh's testimony inadmissible because his opinions lacked a reliable foundation. In

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3. The petitioners refer to their toxicologist, Dr. William George, who opined that wastes from the Cain, Carter and Batieste sites had reached the groundwater beneath those sites and flowed to and contaminated the Cooper well. Petition at 8-9 n.1. The district court recognized that Dr. George's opinion was dependent on Dr. Augenbaugh's flow reversal theory.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993), this Court preserved the district court's duty to screen out expert testimony which lacks a reliable basis. If the expert seeks to impart scientific knowledge to the jury, the proposed testimony must be founded on scientific method.

This Court should deny the petition for writ of certiorari because although this case was decided by the Fifth Circuit and district court before *Daubert*, the ruling on Dr. Augenbaugh's testimony is consistent with Rule 702 of the Federal Rules of Evidence, as interpreted in *Daubert*. Expert opinions lacking a reliable foundation are inadmissible under *Daubert*.

Dr. Augenbaugh sought to opine that (a) the groundwater beneath the disposal sites was contaminated and (b) this groundwater had reversed its normal direction of flow, moved toward and contaminated Cooper's well. Dr. Augenbaugh performed no site specific study of his own. He merely second guessed work and conclusions of other experts. His opinions were based on speculation and were properly excluded.

CERCLA allows a private party to recover costs incurred in "response" to a release or threatened release of a hazardous substance. Cooper is the only petitioner who presented proof of purported response costs.

Because many hazardous substances are naturally occurring, the detection of a hazardous substance on property, of itself, is insufficient to justify a private party's incurrence of costs of response. The hazardous substance must be present in a concentration exceeding some applicable and relevant federal or state standard. If such a concentration does not exist, the private party cannot successfully claim that he or she has been caused to incur response costs. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989).

The petitioners claim that the Fifth Circuit modified *Amoco* in this case, thereby placing the Fifth Circuit in conflict with other circuits. The case was decided on an interpretation of CERCLA consistent with the other circuits. Both the district court and the Fifth Circuit reviewed the record and determined that the disposal sites where Cooper incurred costs posed no threat of release onto Cooper's property over two-thirds of a mile away. Cooper's property was never used as a disposal site by Armstrong. The petitioners have no admissible proof to establish that Armstrong caused hazardous substances to be released into the Cooper water well.

Finally, the petitioners were unable to establish any physical property damage or threat of physical property damage sustained by their properties. In response to Armstrong's motion for summary judgment, the petitioners presented the testimony of real estate appraiser Douglas Upchurch. Mr. Upchurch testified that a "stigma" was attached to the petitioners' properties because of the perception that the properties were polluted. The district court properly dismissed the petitioners' property damage claims because Mississippi law does not recognize market stigma as a compensable property damage.

REASONS FOR DENYING THE WRIT

I.

THE FEDERAL RULES OF EVIDENCE ALLOW A DISTRICT COURT JUDGE TO EXCLUDE EXPERT TESTIMONY IF THE OPINION LACKS RELIABLE FOUNDATION.

The petitioners present their case as an opportunity for the Court to strike down what the petitioners regard as the Fifth Circuit's "result-oriented reinterpretation of the federal rules of civil procedure and the federal rules of evidence." Petition at 16.

According to the petitioners, the "underpinnings" of the Fifth Circuit's prejudice against toxic tort cases were erased by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). However, both the district court and the Fifth Circuit founded their exclusion of expert testimony on a legal and factual basis consistent with *Daubert*.

A. Daubert Recognizes The Trial Court's Duty To Ensure That An Expert's Opinion Has A Reliable Basis.

Fundamentally, *Daubert* deems the *Frye* test superseded by the adoption of the Federal Rules of Evidence. *Daubert*, 113 S. Ct. at 2793. Under *Frye*, "the thing from which the [expert's] deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). This Court, in *Daubert*, removed "general acceptance" of the expert's technique as a necessary prerequisite to the admissibility of the expert's opinion. *Daubert*, 113 S. Ct. at 2794.

Daubert does not, however, eliminate the trial judge's authority and duty to screen expert opinions: "To the contrary, under the [Federal] Rules [of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but *reliable*." *Id.* at 2795 (emphasis added).

Daubert reads Rule 702 to require that the "knowledge" a scientist seeks to impart to the jury be based on more than conjecture.

> The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation. . . . [I]n order to qualify as 'scientific knowledge,' an inference or

> assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation — *i.e.*, 'good grounds,' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability.

Daubert, 113 S. Ct. at 2795 (quoting Fed. R. Evid. 702).

Here, as the district court noted, Cooper's toxicologist, Dr. William George, and medical doctor, Dr. Lawrence Miller, conceded that the suspect chemicals could not have caused Cooper's cancer unless they were in the drinking water at concentrations significantly exceeding background levels. (A26 - 27).[4] Dr. George went further by acknowledging that the chemical concentrations in Cooper's well water were insufficient to have caused his cancer. (A27). Nevertheless, Dr. Miller opined that the causal link existed because the requisite concentrations existed from 1950 through the 1970s. Dr. Miller assumed that these concentrations existed because Dr. Nolan Augenbaugh, Cooper's geologist, had so opined. (A27).

The district court, consistent with *Daubert's* reading of Rule 702, ruled Dr. Augenbaugh's testimony inadmissible because it was not founded on scientific methodology; it was based on speculation. Dr. Augenbaugh's opinion was founded on only a cursory review of studies performed by Armstrong's consulting engineers. He performed no site specific study of his own, had no facts to support his opinion and he rejected the field data reported in the engineering studies of the site: "Speculation followed by speculation, unlinked to the case-specific facts, should be rejected." (A28).

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4. Reference to the Petitioners' Appendix.

The district court also found that Dr. Augenbaugh speculated that the Natchez aquifer beneath the disposal sites is polluted. (A31). This is a huge assumption because, as stated above, (a) it assumes contaminants have descended through 100-150 feet of soil to reach the aquifer and (b) that this aquifer reversed its natural flow and polluted the Cooper well at sufficient concentrations over a sufficient period of time to cause Cooper's cancer. The district court noted that this was countered by hard scientific data to the contrary. Likewise, Augenbaugh's flow reversal theory was met with geological facts to the contrary. "The court observes that [Augenbaugh's theory] is sheer speculation about the possible, not a study of the data or application of any scientific methodology." (A32). *See also Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 614 (7th Cir. 1993) (Applying *Daubert:* "If experts cannot tie their assessment of data to known scientific conclusions, based on research or studies, then there is no comparison for the jury to evaluate and the expert's testimony is not helpful to the jury").

B. The Dissent In *Christophersen* Is Not Prophetic of *Daubert.*

At the time that this case was briefed and argued before the Fifth Circuit, the governing case on the admissibility of expert testimony was *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992). The petitioners complain that the Fifth Circuit committed error by refusing to remand or rehear the case after this court released *Daubert.* This Court noted in *Daubert*, however, that under *Christophersen*, the Fifth Circuit regarded the *Frye* test and the Federal Rules of Evidence as co-existing. *Daubert*, 113 S. Ct. at 2793 n.5. Therefore, since the district court excluded Dr. Augenbaugh's testimony based on an interpretation of the Federal Rules of Evidence consistent with *Daubert* and untainted by *Frye*, this case is not a proper case for the Court to review *Christophersen's* alleged inconsistency with *Daubert*.

The petitioners rely on the *Christophersen* dissent as if it predicted the rule in *Daubert*. Petition at 17. According to the dissent, a district court may not analyze the expert's "methodology." *Christophersen*, 939 F.2d at 1129 (Reavley, C.J., dissenting). This is exactly contrary to the point of *Daubert* that the district court judge has a duty to ensure that the expert's opinion is founded on scientific methodology and not speculation.

II.

IN A CERCLA ACTION TO RECOVER RESPONSE COSTS, THE PLAINTIFF MUST PRESENT PROOF THAT A RELEASE OR THREATENED RELEASE OF A HAZARDOUS SUBSTANCE BY THE DEFENDANT CAUSED THE PLAINTIFF TO INCUR RESPONSE COSTS.

The petitioners urge this Court to grant certiorari to correct the Fifth Circuit's criteria for a *prima facie* CERCLA cost recovery action. According to the petitioners, in this case, the Fifth Circuit stepped out of line with other circuits by modifying the elements set out in *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989), to require "that the contaminants be on plaintiffs' property for the site to constitute a facility under [CERCLA]." Petition at 18 (citing A13). In this alleged departure from *Amoco*, according to the petitioners, the Fifth Circuit now requires "that response costs, to be recoverable, must be incurred in the testing or cleaning of the plaintiffs' property." Petition at 19. The petitioners contend that this supposed amendment to *Amoco* puts the Fifth Circuit at odds with *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1st Cir. 1989), which allows a plaintiff to recover CERCLA response costs even if the plaintiff did not own the land where the contaminants were released. Petition at 19-20.

A. In This Case, The Fifth Circuit Acted Consistent With *Amoco* and *Dedham* By Requiring That The Petitioners Have Proof That A Release Or Threatened Release By Armstrong Caused Them To Incur Response Costs.

The Fifth Circuit's ruling in this case is consistent with *Dedham*. While *Dedham* does not require that the plaintiff's property be contaminated as a prerequisite to CERCLA liability, *Dedham* does require, consistent with *Amoco*, that the release or threatened release of a hazardous substance *caused* the plaintiff to incur response costs. *Dedham*, 889 F.2d at 1153 ("[T]he question is whether the release or the threatened release by a defendant has caused a plaintiff to incur response costs); *Amoco* 889 F.2d at 668 (A CERCLA cost recovery action requires "that the release or threatened release has caused the plaintiff to incur response costs").

In this case, the Fifth Circuit focused on whether the Cain, Carter or Batieste sites posed any threat of contaminating Cooper's property. After reviewing the record, the Fifth Circuit agreed with the district court that there was no evidence that the three sites had contaminated or that they posed an imminent threat to the Cooper property.[5] (A6-8). Because there was no hazardous waste disposal directly on the Cooper property, the Court had to review whether purported wastes from the three sites could be transported to the Cooper property via groundwater. (A8). Consistent with *Daubert*, the Fifth Circuit concluded that Dr. Augenbaugh's opinion, the only possible evidence of this route of transportation of wastes, lacked a scientific foundation, was pure speculation and, therefore, was inadmissible. (A9-11). Since no evidence existed to establish that the three disposal sites posed a threat to pollute Cooper's property, the only remaining way to establish CERCLA liability was for Cooper to establish that the hazardous substances were, in

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5. Cooper is the only plaintiff submitting any proof that he incurred alleged response costs.

fact, on his property, thus making his property a "facility." The Fifth Circuit found that this evidence was also lacking. (A12).

This analysis is consistent with *Dedham*. Dedham Water was a regulated public water utility whose primary water supply was the White Lodge Well Field. The defendant, Cumberland Farms, discharged pollutants which eventually drained into the White Lodge Well Field. *Id.* at 1148. While Dedham Water's property was not contaminated, its water supply source was. Therefore, Dedham Water, by Cumberland Farms' actions, had been caused to incur response costs. *Id.* at 1148, 1152-53. *See Dedham*, 889 F.2d at 1154 n.8 (recognizing that under *Artesian Water Co. v. Government of New Castle County*, 659 F.Supp. 1269 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988), "there must be a causal connection between the defendant's conduct and the plaintiff's incurrence of costs") (emphasis original).

Likewise, the present case is inappropriate for the granting of certiorari because its ruling on CERCLA liability is consistent with other circuits. *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993), is particularly significant because of its factual similarity to this case. The plaintiff Water Authority sued Tonolli, the owner of an adjacent lead smelting plant, for response costs under CERCLA. Tonolli established, as did Armstrong in this case, that the plant was "hydrogeologically isolated from the Authority's water production wells so that contamination on the Tonolli property would not migrate to the Authority's water supply." *Id.* at 1216. The Third Circuit determined that the district court's finding of hydrogeological isolation was not clearly erroneous. There being no threat of contamination, the plaintiff was not entitled to future costs that the authority expected it would incur if such a threat existed. *Id.*[6] *See*

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6. The Authority was entitled to recovery of monitoring costs it had already incurred because there was evidence that there was a "reasonable risk" that the Tonolli plant, next to the Authority's property, would contaminate the Authority's property. *Lansford*, 4 F.3d at 1218-19. Here, the record contains no evidence that such a risk ever existed.

also, White v. County of Newberry, 985 F.2d 168, 174 (4th Cir. 1993) (The plaintiffs could not recover under CERCLA because they could not show that the defendant would release the TCE so that it would flow into the plaintiff's well "or that the topography of the surrounding land even would allow drainage to flow from the County's property to the White's well").[7]

B. A Party Has Not Been Caused To Incur Response Costs Unless The Hazardous Substance Is Present In A Concentration Exceeding Some Applicable Federal Or State Standard.

The district court subdivided *Amoco's* fourth element of a *prima facie* CERCLA case into two parts. The plaintiff must submit proof that the hazardous substance found at the site is "(4) in a quantity which exceeds some federal or state standard . . . (6) [and] the presence of the hazardous substance on the site poses an imminent and substantial threat to health or the environment." (A37).

Response costs are recoverable only if the plaintiff has acted to contain a release that threatened the public health or the environment. *Amoco*, 889 F.2d at 669. Many of the suspect substances (arsenic, cadmium, chromium and lead) complained of by petitioners occur naturally in the environment. Thus, as noted in *Amoco*, "[r]emedial actions taken in response to hazardous substances as they occur naturally are specifically excluded from the NCP (National Contingency Plan] and are therefore not recoverable." *Id.* The threshold issue plainly stated is "whether the

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7. The petitioners further argue that *In re Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993) is evidence that the Fifth Circuit is out of line with other circuits on CERCLA law. Petition at 20. In *Bell*, the Fifth Circuit addressed the question of joint and several liability under CERCLA. Joint and several liability is not an issue in this case and, therefore, this case is an inappropriate vehicle for the review of *Bell*.

particular hazard justified any response actions." A response action is only justified where a "legally applicable or relevant and appropriate . . . requirement [ARAR]" has or is threatened to be violated by release. *Id.* at 671.

> We hold that a plaintiff who has incurred response costs meets the liability requirement as a matter of law if it is shown that any release violates, or any threatened release is likely to violate, any applicable state or federal standard, including the most stringent.

Amoco, 889 F.2d at 671.

1. Cooper's Well

Beginning at page 5 of the Petition, the petitioners have reproduced a chart they presented to the Fifth Circuit which purports to show that hazardous substance concentration levels in Mr. Cooper's well currently exceed the drinking water standard or maximum contaminant level (MCL). Closer examination of the record reveals that the chart distorts the truth.

a. Cadmium - The petitioners cite cadmium concentrations of 10 and 20 ppb.[8] The petitioners selected the three oldest samples and two of these samples were at 10 ppb, equal to, but not exqeeding, the MCL for cadmium. In seven subsequent samples, including one sample taken and analyzed by the plaintiffs' chemist, Wilma Subra, cadmium was analyzed for but not detected. (R.Vol. 6, pp. 1979, 1981, 1992).

b. Mercury - Tests by Armstrong's successor, Fidelity

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8. The concentration measurement of ug/l approximately equates to parts per billion (ppb).

Tire Corporation ("Fidelity"), showed high concentrations of mercury in the Cooper well and two other wells on the same date. When these mercury levels were not repeated in subsequent tests, the Mississippi Department of Environmental Quality ("DEQ") concluded that the detection of mercury was lab error. (R. Vol. 8, p. 3132).

c. Selenium - The Cooper well was tested for selenium on nine occasions and concentrations never exceeded the MCL of 50 ppb. (R. Vol. 9, p. 3414).[9]

d. Arsenic - The petitioners' chart reports three samples where arsenic was detected, at 3 ppb, 12.6 ppb and 12 ppb respectively. Each result is well below the MCL of 50 ppb. On eight other occasions, including a test by the petitioners' chemist, Wilma Subra, arsenic was analyzed for and not detected. (R. Vol. 6, pp. 1979, 1981, 1991).

e. Phenol - The petitioners' chart shows phenol detected at 100 ppb and 1.2 ppb. The chart does not report a drinking water standard or MCL for phenol because there is none. (R. Vol. 9, p. 3534). The petitioners had the burden of proving to the district court that phenol exceeds a relevant standard.

f. Benzene - DEQ's first test of Cooper's well showed a very high concentration of benzene (2,480 ppb). DEQ suspected that the high benzene level was caused by lab contamination. Two later tests confirmed that lab error occurred on the first test. The results of the second and third tests were less than the detection limits of 10 ppb and 5 ppb, respectively, meaning that on both

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9. The selenium graph the petitioners cite to is misleading because it appears to show MCL at about 30 ppb. Nevertheless, the only sampling result which appears to exceed 30 ppb is "ND @ 40," meaning that selenium was not detected when a 40 ppb detection limit was used.

occasions, the benzene level was too low to detect. (R.Vol. 8,pp. 3127, 3178).

2. "Cooper Stream"

The petitioners' chart lists testing results on Cemetery Bayou which they have renamed "Cooper Stream" for purposes of their petition. (R.Vol. 6, p. 2016).

The petitioners' chart alleges that the ARAR is located at 40 C.F.R. § 141.32(e) and § 141.63. Neither section provides ARARs for fresh water streams. Part 141 of 40 C.F.R. applies only to public water systems[10] that sell water. 40 C.F.R. § 141.3. There is scant information about Cemetery Bayou in the record. One fact is clear — the bayou is not a public water system governed by the drinking water standards of 40 C.F.R. § 141.

Moreover, the record does not indicate that the sample was taken on or even adjacent to Mr. Cooper's property (Vol. 9, R. 3391); nor does it establish that the chemicals came from an Armstrong disposal site.

3. Carter Soil

The petitioners' chart on page 6 of their petition purports to establish that certain metals in the Carter soil are "above background . . . [and] above EPA standards." The petitioners have not, however, cited to the Court an ARAR for these substances. The section cited, 40 C.F.R. § 261.24, describes toxicity characteristics used by EPA to determine whether a solid waste is a

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10. To meet the definition of a "public water system," the system must provide piped water to the public for human consumption "if such system has at least 15 service connections or regularly serves an average of at least 25 individuals. . . . 40 C.F.R. § 141.2.

hazardous substance. It is not a standard used to determine whether a release requires a cleanup. The correct substance-to-ARAR comparison is as follows:

Substance	Carter Soil Concentration	ARAR[11]
Arsenic	50 ppm[12]	80 ppm
Barium	910 ppm	4,000-6,000 ppm
Cadmium	1.69 ppm	40 ppm
Chromium	134 ppm	400 ppm
Lead	294 ppm	—[13]

On page 7 of their petition, the petitioners' chart avers that acetone is present in the Carter soil. The petitioners do not provide the Court with the citation of a regulatory standard violated by the concentrations cited. The petitioners' chemist Wilma Subra's chart lists acetone at 7.0, 2.3 and 0.49 ppm. (R.Vol. 8, p. 3029). This is well below the RCRA (Resource Conservation & Recovery Act 42, U.S.C. §§ 6901-92) corrective action standard of 8000 ppm. Also on page 7, the petitioners list ethyl benzene as a hazardous substance present in the Carter soil. The Wilma Subra chart referred to lists ethyl benzene at 0.22 and 0.21 ppm. (R.Vol. 8, p. 3009). This, too, is well below the RCRA corrective action standard of 8,000 ppm.

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11. The ARAR for soils is published at 57 Fed. Reg. 30798 (July 27, 1990) [hereinafter "RCRA corrective action standard"].

12. Concentrations reported at mg/kg (for solids) and mg/l (for liquids) approximately equate to parts per million (ppm).

13. There is no RCRA corrective action level for lead in soils. However, the current position on lead held by the EPA Office of Solid Waste and Emergency Response ("OSWER") is to allow soil concentrations of 500-1,000 ppm to remain in place in residential soils at Superfund sites. OSWER Directive No. 9355.4-02 (Sept. 7, 1989) is reprinted in the Appendix at C.

4. Carter Drums

The drums at the Carter-Batieste sites were removed by Armstrong pursuant to a BPC administrative order. (R. Vol. 6, pp. 2025-27; Vol. 6, p. 2015). Originally, BPC assumed that the Batieste site was located on the Carter Property. Even if the petitioners could establish that the Carter drums contained hazardous substances in violative concentrations, there was and is no remedial action left to be taken.

C. An Examination Of Mr. Cooper's Alleged "Response Costs" Of Itself Proves That He Has Not Acted "To Contain A Release Threatening Health Or The Environment."

Even without reviewing a comparison of hazardous substance concentrations to ARARs, it is apparent that Mr. Cooper has not incurred costs "to contain a release threatening the public health or environment."[14] *Amoco*, 889 F.2d at 669-70. Mr. Cooper has not taken the initiative to stop the spread of hazardous chemicals. The activities of his experts were cumulative of the ongoing state and federal site investigations and were performed to support his common-law claims for personal injury and property devaluation, not to protect people or the environment. The BPC began its investigation of the Cain site on November 6, 1986 — two years before the lawsuit was filed. The BPC and EPA concluded that no threat to health or the environment was posed by conditions at Cain, Carter or Batieste. (A7-8).

Nevertheless, Mr. Cooper engaged in second guessing of the regulatory authorities and, ultimately, in the payment of expert fees to attempt to survive summary judgment. These efforts do not

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14. Wesley Cooper is the only petitioner who has presented proof in the record of amounts expended. Mr. Carter has not submitted evidence that he has incurred response costs.

meet the *Amoco* legal standard for a CERCLA cost recovery action.

1. Invoice of Dr. Ralph Pike

Dr. Pike's invoice for $5,475.00 is dated on December 31, 1990, the eve of the plaintiffs' response to Armstrong's motion for summary judgment. The invoice evidences second guessing by Dr. Pike of BPC's evaluation of environmental conditions "near the home of Mr. Wesley Cooper." Dr Pike reviewed documents and prepared an affidavit in response to the motion for summary judgment. (R.Vol. 10, pp, 4015-16). Mr. Cooper, by filing this lawsuit, may have caused himself to incur a liability to Dr. Pike. No environmental hazard justified Mr. Cooper's incurring this liability; rather, any liability to Dr. Pike was the result of Cooper's unsuccessful effort to maintain common-law claims for personal injury and property devaluation. *See Redland Soccer Club v. Department of the Army*, 801 F. Supp. 1432, 1437 (M.D. Pa. 1992) (Fees for expert witnesses are not CERCLA response costs). It is also important to note that there is no evidence in the record that Mr. Cooper has paid Dr. Pike anything.

2. Invoice of Subra Company

The record contains one statement from Wilma Subra for $4,105.00. (R.Vol. 10, pp. 3035). Below is an item by item review of this invoice.

a. August 18, 1987. Subra sampled and analyzed well water which by this time had been tested three times by BPC and once each by Fidelity, EPA and the State Board of Health. BPC found no benzene present on its first retest and EPA concluded from its tests that no contaminants "approach a level of concern" nor do they "indicate that a public health threat exists from the use and consumption of the area groundwater." (R.Vol. 6, pp. 2039-

40). BPC's study of the Carter drums had been ongoing for over eight months and had not yet found a hazard to human health posed by the site. (R.Vol. 6, pp. 2017A, 2039-41).

b. February 12, 1988. Subra analyzed a "split" sample which was also being analyzed by BPC and Fidelity's consultant, Malcolm Pirnie, Inc. (R.Vol. 6, p. 2042).

c. May 31, 1988. Subra sampled and analyzed material from a drum at the Batieste site. At the time of this sampling, Fidelity was already proceeding under an administrative order issued by BPC to investigate Batieste. (R.Vol. 6, p. 2017A).

d. June 28, 1988. Subra sampled and analyzed a water well of Geeva Monk and a drum at Carter. By this time, Fidelity was investigating Carter under a second adminstrative order issued by BPC. (R.Vol. 6, pp. 2044-46).

e. August 29, 1988. Subra sampled and analyzed drums and soil at Carter. At this point, BPC had been investigating Carter for over twenty months (R.Vol. 6, p. 2039), drums had been sampled by BPC twice, the Carter soil had been sampled by both BPC and EPA (R.Vol. 6, pp. 2040-41), Fidelity completed its first investigation of Carter pursuant to a BPC administrative order and was working on the Phase II investigation (R.Vol. 6, pp. 2043-47).

f. September 23, 1988. Subra took more well water samples after 1) the extensive sampling referred to in no. 1, above, and 2) an additional round of well sampling by BPC in August 1988. (R.Vol. 6, p. 2047).

g. September 19, 25, 1989. This effort by Subra consisted of ground water testing and soil borings at the Cain site. At this time, BPC's investigation of Cain had been ongoing for nearly three years. (R.Vol. 6, p. 2039). BPC had tested sediment

and drum samples at Cain in April 1987. EPA had taken a round of samples and had determined there was no health threat posed by the site. (R.Vol. 6, p. 2040). BPC had collected a third round of drum samples (R.Vol. 6, pp. 2040-41). BPC had issued and Fidelity had complied with an administrative order for further investigation of Cain. (R.Vol. 6, pp. 2041-43). As part of its compliance with the first administrative order, Fidelity's consultant had tested and analyzed more drum samples and monitoring well samples. (R.Vol. 6, pp. 2042-43). Fidelity had also conducted further investigation of Cain under administrative orders issued in June 1988 and August 1989. (R,Vol. 6, pp. 2017A, 2044-47).

h. October 16, 1989. On this date, Subra tested two water discharge points at the Armstrong tire plant site. This testing has no apparent link to Cain, Carter or Batieste sites which are several miles away.

A second bill, for $6,940.00, reflects partial payment and covers the "collection and analysis of monitoring wells and water well samples and soil borings" in September 1989. (R.Vol. 10, p. 3036). This bill also contains $2,640.00 in billings dated December 1990, apparently for preparing a response to Armstrong's motion for summary judgment.

D. The Petitioners Were Properly Denied A Declaratory Judgment.

Petitioners assert that CERCLA requires that parties only sustain some response costs to be entitled to a declaratory judgment on liability. Petition at 21. However, declaratory judgments are governed by 28 U.S.C. § 2201 and as explained in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 61 S. Ct. 510 (1941), in order for a case to be justiciable under the Declaratory Judgment Act, it must present "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* 61 S.

Ct. at 512. In this case, after more than five years, petitioners have not removed or remediated anything and have not incurred recognizable response costs. Hence, declaratory judgment on liability was not an appropriate option for the district court.

The cases relied on by the petitioners are not authority for the proposition that merely incurring "some response costs" entitles a private party to declaratory judgment on the issue of liability. In *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983), it was the State of Ohio and not private parties which brought the action to collect costs related to cleaning up a dump from former owners, operators, generators and transporters. As noted by the district court, "the controversy has advanced to a very 'real' level. Ohio alleges that it has already sustained at least $825,000.00 in damages . . . ." *Id.* at 1316. In *Kelly v. Thomas Solvent Co.*, 727 F. Supp. 1532 (W.D. Mich. 1989), the State of Michigan and not a private party, brought an action in response to established groundwater contamination. *United States v. Hardage*, 733 F. Supp. 1424 (W.D. Okla. 1989) was an action by the United States which sought partial summary judgment for response costs incurred in cleaning up the Hardage site. The district court found that the United States had incurred $5,441,201.25 of response costs and granted judgment for that amount and, in addition, granted a declaratory judgment for liability for future response costs associated with the site. Moreover, the declaratory judgment in the government's favor was reversed on appeal. *United States v. Hardage*, 982 F.2d 1436 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 300 (1993). *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93 (D.Mass. 1990) was not a CERCLA case but, instead, an action under Massachusetts law by a current landowner against the former landowner who had contaminated the site.

There is no authority for the proposition that costs expended in furtherance of common law tort claims demand that the trial court

grant declaratory judgment adjudicating liability for future CERCLA removal or remediation costs.

III.

UNDER MISSISSIPPI LAW, A MARKET STIGMA IS NOT A COMPENSABLE DAMAGE, ABSENT A CONFIRMED PHYSICAL PROPERTY DAMAGE OR A CONFIRMED THREAT OF PHYSICAL PROPERTY DAMAGE.

The petitioners argue that the district court ignored Mississippi law that "monetary damages include decreased market value caused by the stigma associated with the public discovery that hazardous wastes were placed on the property." Petition at 25. As the district court noted, however, the petitioners' expert discerned that their property values declined because of a *perception* that hazardous wastes were presently on the property, not because proof confirmed that such wastes were present.

Petitioners' real estate expert Douglas Upchurch opined that because of a stigma Cooper's property would be depreciated by 28 to 33 percent of its otherwise fair market value. (R.Vol. 6, p. 2408). As for the Carter property, he opined a fair market value of $50,000 and a zero value due to the stigma associated with the property. (R.Vol. 6, p. 2412). Upchurch's opinions were founded on the erroneous premise that the properties were contaminated and that Mr. Cooper's well was polluted. (R.Vol. 6, pp. 2405, 2410).

In rejecting Upchurch's opinion of damage arising from stigma, the district court determined that under Mississippi law "a market stigma is not a compensable damage absent a confirmed physical property damage or a confirmed threat of physical property damage." (R.Vol. 10, pp. 4147-48) (citing *Dennery v. Hughes*, 214 Miss. 687, 59 So.2d 316 (1952)). In *Dennery*,

plaintiffs sought to enjoin the establishment of a cemetery in the vicinity of their homes. They alleged that the cemetery would cause them to suffer irreparable damage in their property values. The Mississippi Supreme Court refused to regard the cemetery's supposed effect on perceived property values as an actionable harm.

The petitioners attack the district court's stigma ruling contending "that the presence of hazardous substances under a citizen's home, in a citizen's well, or in a citizen's stream" is " 'confirmed physical property damage.' " Petition at 25. As the district court recognized, based on the record, the petitioners have failed to create an issue of fact about stream pollution, well pollution, or hazardous substances under or on petitioners, properties. Case law relied on by the petitioners does not excuse the absence of confirmed physical property damage or interference with the plaintiff's enjoyment of his property. *See City of Jackson v. Filtrol Corp.*, 624 F.2d 1384 (5th Cir. 1980) (PCP from the defendant's plant polluted the plaintiff's lake in sublethal concentrations); *Phillips v. Davis Timber Co.*, 468 So. 2d 72 (Miss. 1985) (PCP from the defendant's wood treatment plant polluted plaintiff's lake); *Bynum v. Mandrel Indus., Inc.*, 241 So.2d 629, 631 (Miss. 1970) (The defendant exploded dynamite on the plaintiff's property, damaging plaintiff's ponds); *Love Petroleum Co. v. Jones*, 205 So.2d 274 (Miss. 1967) (Oil and salt water from the defendant's oil well fed into a creek running across plaintiff's land, killing trees and fish); *Central Oil Co. v. Shows*, 246 Miss. 300, 149 So.2d 306 (1963) (Chemicals from defendant's slush pit escaped onto the surface of plaintiff's property); *City of Oxford v. Spears*, 228 Miss. 433, 87 So.2d 914 (1956) (City discharged raw sewage into a creek running across plaintiff's land); *Edge v. City of Booneville*, 226 Miss. 108, 83 So.2d 801 (1955) (Obnoxious odors and popping noises from the defendant's natural gas reduction station fifty feet away from the plaintiff's property reduced the plaintiff's property value); *Masonite Corp. v. Steede*, 198 Miss.

530, 23 So.2d 756 (1945) (Defendant's plant polluted the river, causing fish kills. Plaintiff's fishery, located on the river, went out of business); *Masonite Corp. v. Dennis*, 175 Miss. 855, 168 So. 613 (1936) (Plaintiff's case was dismissed for lack of evidence).

It follows that the district court's rejection of appraiser Upchurch's opinion and the plaintiffs' claims for property damage based on market stigma was properly sustained by the Fifth Circuit.

CONCLUSION

For the reasons stated, Respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A — FEDERAL STATUTORY PROVISIONS

42 U.S.C. § 9601(9) (1993).

The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(14) (1993).

The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Appendix A

42 U.S.C. § 9607(a) (1993).

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States government or a State or an Indian tribe not inconsistent with national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

Appendix A

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

APPENDIX B — FEDERAL RULES OF EVIDENCE

Fed. R. Evid. 702.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 703.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

APPENDIX C — OSWER DIRECTIVE # 9355.4-02

PURPOSE

The purpose of this directive is to set forth an interim soil cleanup level for total lead, at 500 to 1000 ppm, which the Office of Emergency and Remedial Response and the Office of Waste Programs Enforcement consider protective for direct contact at residential settings. This range is to be used at both Fund-lead and Enforcement-lead CERCLA sites. Further guidance will be developed after the Agency has developed a verified Cancer Potency Factor and/or a Reference Dose for lead.

BACKGROUND

Lead is commonly found at hazardous waste sites and is a contaminant of concern at approximately one-third of the sites on the National Priorities List (NPL). Applicable or relevant and appropriate requirements (ARARS) are available to provide cleanup levels for lead in air and water but not in soil. The current National Ambient Air Quality Standard for lead is 1.5 ug/m^3. While the existing Maximum Contaminant Level (MCL) for lead is 50 ppb, the Agency has proposed lowering the MCL for lead to 10 ppb at the tap and to 5 ppb at the treatment plant[1]. A Maximum Contaminant Level Goal (MCLG) for lead of zero was proposed in 1988[2]. At the present time, there are no Agency-verified toxicological values (Reference Dose and Cancer Potency Factor, i.e., slope factor), that can be used to perform a risk assessment and to develop protective soil cleanup levels for lead.

Efforts are underway by the Agency to develop a Cancer Potency Factor (CPF) and Reference Dose (RfD), (or similar approach), for lead. Recently, the Science Advisory board strongly suggested that the Human Health Assessment Group (HHAG) of the Office of Research and Development (ORD) develop a CPF for

lead, which was designated by the Agency as a B2 carcinogen in 1988. The HHAG is in the process of selecting studies to derive such a level. The level and documentation package will then be sent to the Agency's Carcinogen Risk Assessment Verification Exercise (CRAVE) workgroup for verification. It is expected that the documentation package will be sent to CRAVE by the end of 1989. The Office of Emergency and Remedial Response, the Office of Waste Programs Enforcement and other Agency programs are working with ORD in conjunction with the Office of Air Quality Planning and Standards (OAQPS) to develop an RfD, (or similar approach), for lead. The Office of Research and Development and OAQRS will develop a level to protect the most sensitive populations, namely young children and pregnant women, and submit a documentation package to the Reference Dose workgroup for verification. It is anticipated that the documentation package will be available for review by the fall of 1989.

IMPLEMENTATION

The following guidance is to be implemented for remedial actions until further guidance can be developed based on an agency verified Cancer Potency Factor and/or Reference Dose for lead.

Guidance

This guidance adopts the recomendation contained in the 1985 Centers for Disease Control (CDC) statement on childhood lead poisoning[3] and is to be followed when the current or predicted land use is residential. The CDC recommendation states that "... lead in soil and dust appears to be responsible for blood levels in children increasing above background levels when the ooncentration in the soil or dust exceeds 500 to 1000 ppm." Site-

specific conditions may warrant the use of soil cleanup levels below the 500 ppm level or somewhat above the 1000 ppm level. The administrative record should include background documents on the toxicology of lead and information related to site-specific conditions.

The range of 500 to 1000 ppm refers to levels for total lead, as measured by protocols developed by the Superfund Contract Laboratory Program. Issues have been raised concerning the role that the bioavailability of lead in various chemical forms and particle sizes should pay in assessing the health risks posed by exposure to lead in soil. At this time, the Agency has not developed a position regarding the bioavailability issue and believes that additional information is needed to develop a position. This guidance may be revised as additional information becomes available regarding the bioavailability of lead in soil.

Blood-lead testing should not be used as the sole criterion for evaluating the need for long-term remedial action at sites that do not already have an extensive, long-term blood-lead data base[1].

EFFECTIVE DATE OF THIS GUIDANCE

This interim guidance shall take effect immediately. The guidance does not require that cleanup levels already entered into Records of Decisions, prior to this date, be revised to conform with this guidance.

Appendix C

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1. In one case, a biokinetic uptake model developed by the Office of Air Quality Planning and Standards was used for a site-specific risk assessment. This approach was reviewed and approved by Headquarters for use at the site, based on the adequacy of data (due to continuing CDC studies conducted over many years). These data included all children's blood-lead levels collected over a period of several years, as well as family socio-economic status, dietary conditions, conditions of homes and extensive environmental lead data, also collected over several years. This amount of data allowed the Agency to use the model without a need for extensive default values. Use of the model thus allowed a more precise calculation of the level of cleanup needed to reduce risk to children based on the amount of contamination from all other sources, and the effect of contamination levels on blood-lead levels of children.

REFERENCES

1. 53 FR 31516, August 18, 1988.

2. 53 FR 31521, August 18, 1988.

3. Preventing Lead Poisoning in Young Children, January 1985, U.S. Department of Health and Human Services, Centers for Disease Control, 99-2230.

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J. WESLEY COOPER, MARGARET COOPER
and JAMES CARTER,
Petitioners

v.

THE ARMSTRONG RUBBER COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

NOW INTO COURT, through undersigned counsel, comes your petitioners, who would respectfully suggest to this Honorable Court that respondent's brief in opposition to petitioner's Writ for Certiorari contains gross misstatements of fact and law the delineation of which would exceed the page limitations.

A review of the respondent's brief would establish conclusively that many of the underlying facts in this case are disputed. These disputed issues should have prevented the trial court from granting summary judgment. Every issue, from the extent of contamination resulting from the defendant's disposal activities to the reasonableness of the costs incurred by the petitioner are not undisputed. Respondent's brief contains arguments relating

more to a defense on the merits rather than one appropriate for a summary judgment. The respondent goes so far as to deliberately confuse arguments related to personal injury claims which are not an issue here. Respondent does not rebut petitioners expert testimony as it relates to petitioner's property damage claims under Mississippi law. For example, respondent seems to equate a finding by certain state officials that "no imminent threat to human health at the sites" is in some way applicable to the respondents liabilities for response costs and property damages.

Petitioner would like to reply to several blatent misstatements of fact present in the response to the Petition for Writ of Certiorari.

The defendant seems to allege that Mr. Carter gave it permission to dump hazardous waste on his property. See response page 2. Nothing could be further from the truth. The following testimony in the record establishes conclusively that no permission was given to Armstrong to deposit these wastes on the property.

Armstrong in its 30(b)(6) deposition admitted to the disposal of liquid hazardous wastes on Carter's property. Armstrong testified as to plaintiff Carter's property as follows:

> "Q. *Are you telling me that you found some containers out there containing liquid waste on his property?*
>
> A. *Yes.* . . .
>
> I want to back up and say something with regard to—Mr. Carter's statement. In all fairness to him, his request for checking erosion in the ravines, as I understand from him, would have been confined to tires or scrap rubber. *I think the presence of any drums or material of that type would have occurred inadvertently or however, but not at his request.*" (Emphasis Added) R-Vol. 8 pg. 3209-3211 (30(b)(6) deposition of Armstrong)

It was the adoption of the defendant's misstatements of facts and applicable law that apparently formed the basis of the Appellate Court's decision in this case. That decision conflicted with the District Court's opinion and also with the facts in the record. A full review of these disputed facts is mandated by the Constitution of the United States.

I. Response to Armstrong's reasons for denying the Writ.

This Honorable Court should at a very minimum grant the Writ of Certiorari, clarify the law regarding CERCLA, and remand this case to the District Court for full evaluation of the expert testimony in the record in light of *Daubert*.

As previously stated, the respondent's arguments on this point revolve solely around the personal injury claim aspect of this litigation and not the CERCLA or property damage claims. No direct response was made to the testimony of plaintiff's experts which were specifically delineated in footnotes one through four of the Petition for Writ of Certiorari. Apparently, the defendant does not deny that this expert testimony is reliable but only contends that, as it relates to the personal injury claims, it was properly excluded.

CERCLA allows a claimant to recover investigatory costs whether or not a removal or remedial action is necessitated. The defendant seems to contend that because a cleanup was not necessitated by the analytical results in the record which is disputed, that the plaintiff cannot recover investigatory costs incurred in determining whether or not a cleanup is necessary. Such an interpretation would do nothing but to defeat the purpose of CERCLA which is to promote investigation into past hazardous waste disposal practices.

The record establishes that Mr. Cooper spent in excess of $14,000.00 hiring back hoes and contractors to

remove drums as well as experts to perform analytical testing and interpretation of those results. Such investigatory costs certainly are recoverable under CERCLA. The defendant further confuses the difference between what is a hazordous waste and/or substance under CERCLA and what level of waste mandates a RCRA cleanup. The Resource Conservation and Recovery Act is not at issue here since it applies to facilities which are currently in operation. 42 USC § 6901-6902. All of the ARAR's as cited on page 17 of the respondents brief relate to RCRA and not CERCLA.

As previously stated, the Appellate Court did not review this record de novo, because if it had it could never have affirmed the District Court's decision. The record indisputably establishes that Armstrong dumped in excess of one million pounds of waste at these locations and that the plaintiff, in a good faith attempt to ascertain the extent of contamination incurred response costs. The District and Appellate Courts were able to deny the petitioner his constitutional rights to a jury trial by misapplication of the Federal Rules of Evidence. Such misapplication is a violation of petitioner's constitutional rights which mandates the granting of a writ in this case and a full review of the record in this Court and/or a remand for review of the facts under the appropriate legal guidelines.

Respectfully submitted,

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